

89-774

CASE NUMBER

Supreme Court, U.S.
FILED

NOV 13 1989

JOSEPH F. SPANIOLO, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1989

ROBERT J. MCCARTY,

PETITIONER,

v.

DEPARTMENT OF THE ARMY,

RESPONDENT.

ON PETITION FROM THE UNITED STATES

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MCCARTY (PRO SE)
1877-7, IRIYA, 4-CHOME
ZAMA CITY
KANAGAWA PREFECTURE
JAPAN 228

TELEPHONE # 001-81-462 53 3946
FAX # 001-81-462 54 7231

QUESTION PRESENTED FOR REVIEW:

In a removal action, before the employee has had a full and fair opportunity to make an oral and written reply to the charges, is it harmful procedural error for a deciding official to direct key witnesses to choose sides against the accused employee?

PARTIES:

All parties listed in caption.

TABLE OF CONTENTS:

PETITION FOR WRIT	PAGE <u>1</u>
APPENDIX	
REHEARING ORDER	PAGE <u>19</u>
JUDGMENT	PAGE <u>21</u>
DECISION	PAGE <u>22</u>
MERIT SYSTEMS PROTECTION BOARD DECISIONS	PAGE <u>25</u>

FINAL DECISION (PAGE 25)

INITIAL DECISION (PAGE 28)

OPINIONS DELIVERED:

On March 18, 1988, McCarty was removed from his civilian position with Department of the Army on the basis of misconduct. On March 22, 1988, McCarty appealed the removal to the Merit Systems Protection Board. McCarty declined a hearing, so the case was decided on the written record. The administrative judge affirmed the agency's decision July 20, 1988. That decision became the final decision of the Merit Systems Protection Board. On appeal and petition for rehearing to the United States Court of Appeals, it was ordered and adjudged: Affirmed, dated July 17, 1989. The petition for rehearing was denied: Order, dated August 23, 1989. Issued as a Mandate: August 30, 1989.

COURT JURISDICTION:

1. Judgment Sought To Be Reviewed -
Judgment, dated July 17, 1989,
United States Court of Appeals for
the Federal Circuit, on appeal from
the Merit Systems Protection Board.

2. Rehearing Order -
Order, dated August 23, 1989,
petition for rehearing denied.

3. Statutory Provision -
The essential requirements of the
process due a public employee
before removal.

REGULATIONS WHICH THE CASE INVOLVES:

The process due a public employee
before removal are notice and an opportunity
to respond. 5 U.S.C. 7513.

MATERIAL FACTS:

Colonel Berry - deciding official

Mr. Kardeke - witness

Mr. McCarty - affected employee

Page 21 - MERIT SYSTEMS PROTECTION BOARD

INITIAL DECISION

"On February 9, 1988, Colonel Berry, the deciding official approached Mr. Kardeke while he was lunching at the Camp Community Club and told him that Mr. McCarty was attacking his credibility, that perhaps Mr. McCarty was not as good a friend as Mr. Kardeke may have thought, and that Mr. Kardeke could not "remain in the middle any longer" and "he had to choose sides."

The Agency unlawfully intruded on the employee's fundamental right to obtain and present evidence to refute the agency charges. If the key witness had fully disclosed the information available the employee would not have been removed from

public service. The employee was prevented from obtaining the evidence necessary to refute the charges.

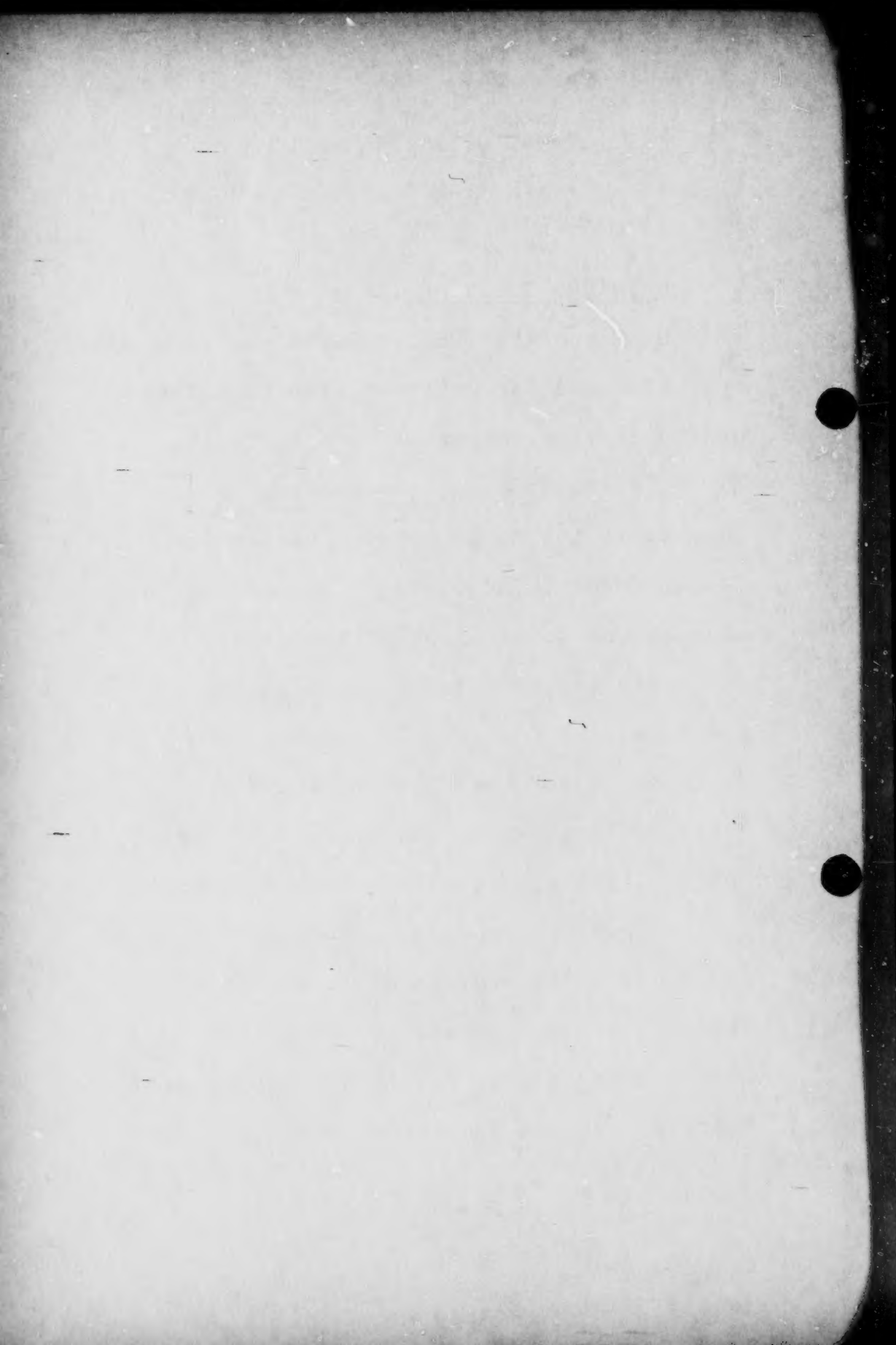
FEDERAL JURISDICTION:

5 U.S.C. 7701 (e) (1); 5 C.F.R.
1301.113 (b).

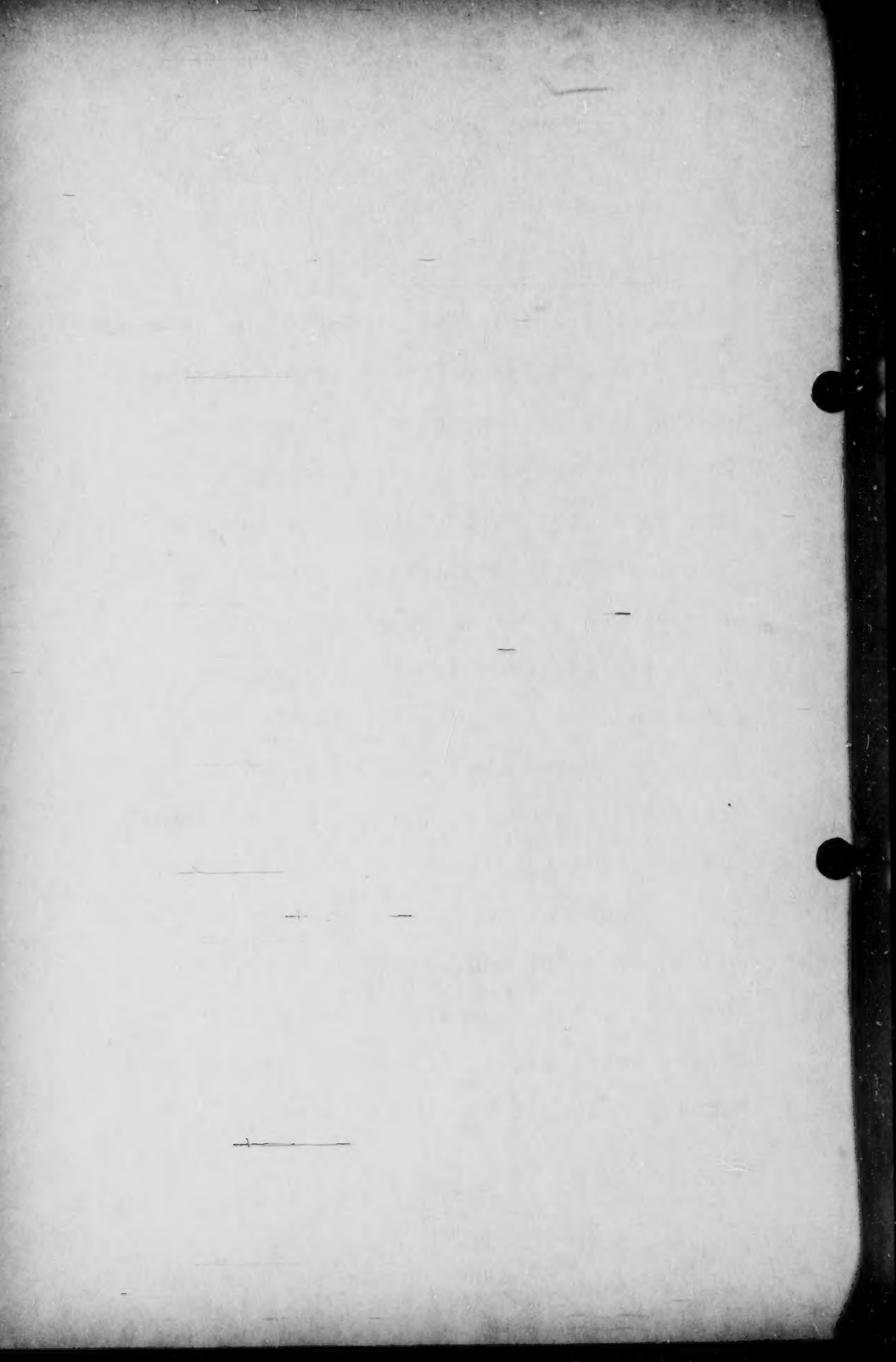
REASONS FOR ALLOWANCE OF THE WRIT:

The United States Court of Appeals for the Federal Circuit has rendered a decision in conflict with congressional intent and one which is intrinsically unconstitutional so as to call for an exercise of this Court's power of supervision.

The process due a public employee before removal are notice and an opportunity to respond: As required by fundamental due process a key witness must be beyond the improper reach of an agency deciding official in an employee adverse action.



In a plain error the lower court failed to recognize that an agency deciding official cannot regulate that a witness must choose sides or attempt to dictate some kind of a loyalty to the witness.: The clear congressional intent was to allow employees to have a fair opportunity to obtain evidence to refute the agency charges. Intrusion on this right attacks at the very heart of fundamental due process. Ex Parte contacts between a deciding official and key witnesses which are not intended for the employee's protection nor for any legal governmental interest constitute harmful procedural error and violate the constitutional due process rights of the concerned employees. Fundamental due process requires that the employees be provided a fair opportunity to refute the reasons for the adverse action, as well as have a fair proceeding by an unbiased deciding official.



Deciding officials who have no possible legitimate or compelling governmental interest to serve by Ex Parte communications with key witnesses have acted willfully in an arbitrary and capricious exercise of delegated authority impeding an employee's fundamental due process right to have the fair opportunity to obtain evidence to refute the reasons for the adverse action which takes a property interest (job). At issue is the preservation of this fundamental right to have a fair opportunity to obtain evidence to refute the reasons for an action which takes a property interest. It is a basic freedom, not some quasi privilege guarded and bestowed on the employee at the prerogative of the agency official. A deciding official cannot intrude on the employee's right to obtain evidence, it must be demonstrated that there is a compelling interest that has not been met

by having the witness contacted by other agency personnel. Further, it can be readily argued that when Congress intended to give the employee a chance of succeeding in making an oral reply to the charges it most probably reasoned that deciding officials would not be directly contacting witnesses and either influencing or being influenced by them before the employee made his oral reply in a full and fair opportunity to refute the charges. The court recognized in *Washington v. United States*, 147 F. Supp. 284 (Ct. Cl. 1957) that bureaucratic superiors, like other human beings, are susceptible to the effects of personal contact. In the absence of an agency pre-termination hearing it is clear that Congress intended the deciding official to only be influenced by the facts of the case and the personal contact with the affected employee not by the personal contact with the witnesses.

Fundamental due process mandates the deciding official be unbiased, however, if the witness is to be contacted by a deciding official it must be done in such a manner that it is evenhanded wherein the employee is present or represented. In the absence of an agency pre-termination hearing, there can be no legitimate interest served to justify Ex Parte communication between a deciding official and a key witness.

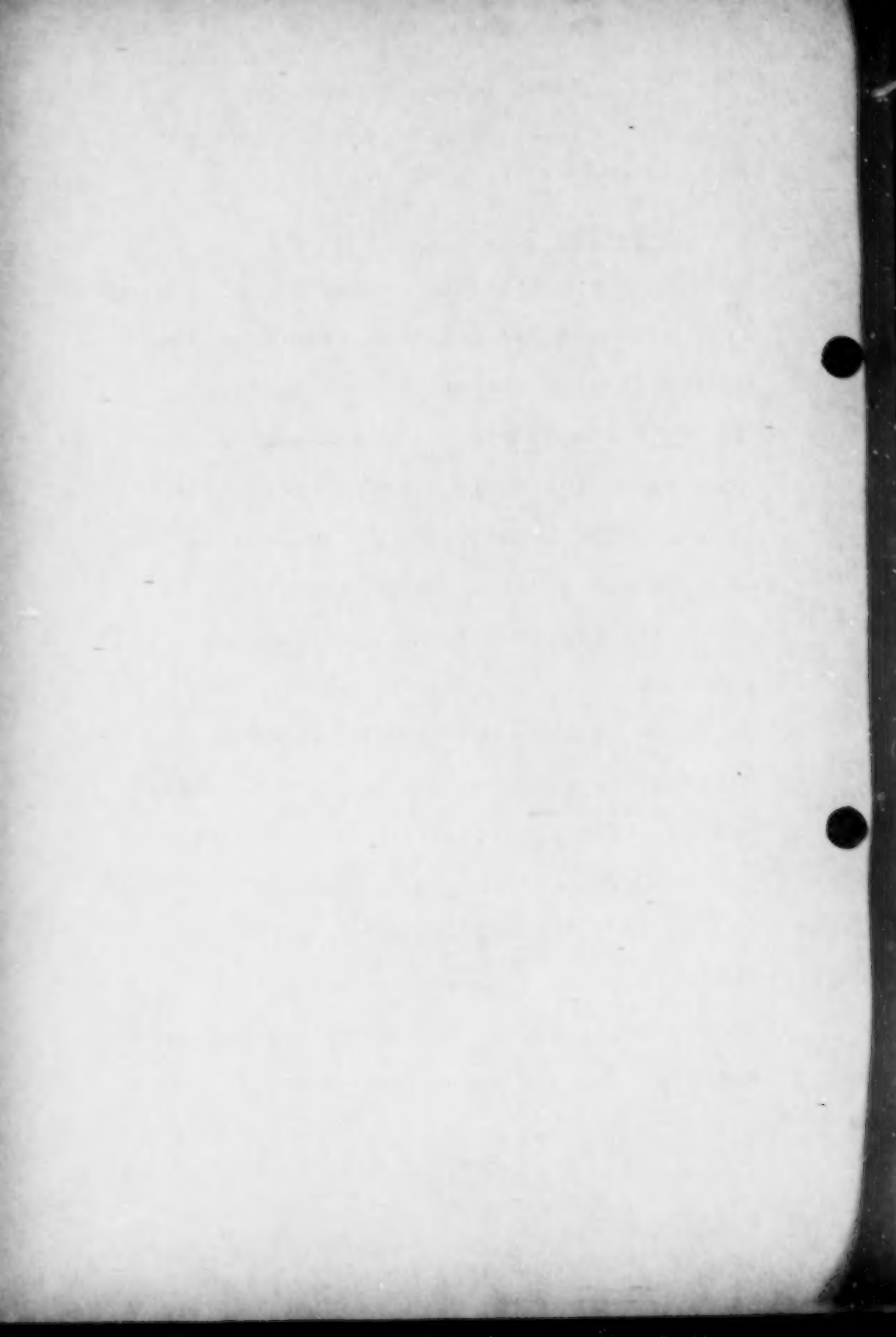
An employee's right to present evidence in rebuttal to any agency proceeding which takes a property interest means little if the key witnesses have been directly contacted by the deciding official and this right means even less if key witnesses have been told that they must CHOOSE SIDES against the employee. Since the court has already recognized the deciding official, like

other human beings, is susceptible to personal contact, Ex Parte contacts can only serve to undermine the due process rights of the affected employee.

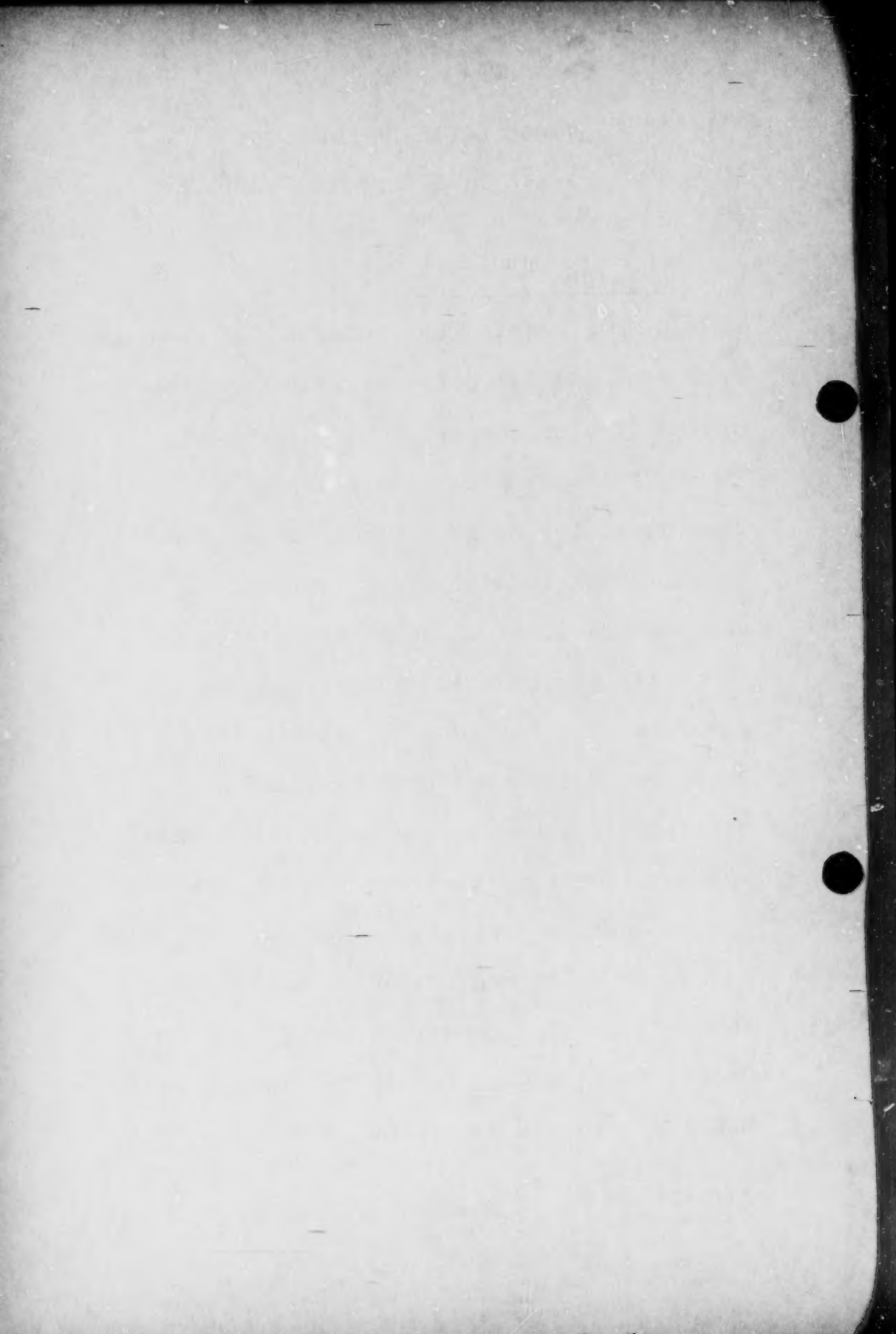
In the petitioner's case the specific nature of the Ex Parte contact belies any claim of possible legitimate or compelling governmental interest and serves to evidence that the deciding official was clearly biased towards the employee. It is an undisputed fact that the deciding official approached a key witness and told the witness the witness had to choose sides against the employee. The petitioner contends that this is a violation of due process and contrary to the clear congressional intent to allow an employee a fair opportunity to refute the reasons for the adverse action: 5 U.S.C. 7513 (b) (2) allows the employee the time to obtain the statements and affidavits and 5 U.S.C.



7513 (b)(1) mandates that employee be given specific reasons: The clear congressional intent was to afford the employee a fair opportunity to refute the reasons for the action. These laws mean little if they are eroded by the intrusion on the employee's right to obtain evidence and the intrusion on the employee's right to present that evidence to an unbiased deciding official who has not been influenced by personal contact with witnesses. The deciding official's action of demanding that witnesses choose sides against the employee was contrary to congressional intent because it was clearly, an arbitrary and capricious exercise of delegated authority intended to ensure that the employee NOT have a fair opportunity to respond to the reasons for the dismissal. The contact with the two (2) witnesses (Kardeke/his wife) with the only apparent motive, none other

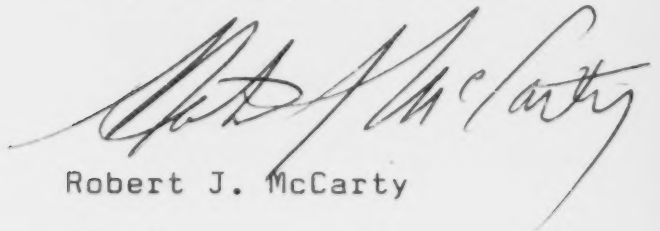


appearing or argued by the agency, than to prevent the employee from learning anything the employee could use in the case is an arbitrary and capricious exercise of delegated power: The fundamental rights which were overlooked by the lower court is that the employee had a substantial legal right to obtain evidence to refute the charges up until the time a decision was made to remove the employee. The deciding official acted willfully in an intentional misdeed which was deliberately calculated to create factitious, discordant and quarreling relationships with the witnesses to insure the witness would not provide the petitioner with any other useful information to refute the charges: If 5 U.S.C. 7513 (b)(1) & (2) mean anything then they must insure the right of the employee to also be free from the deciding official's unwarranted intrusion into the matter of presenting an adequate defense



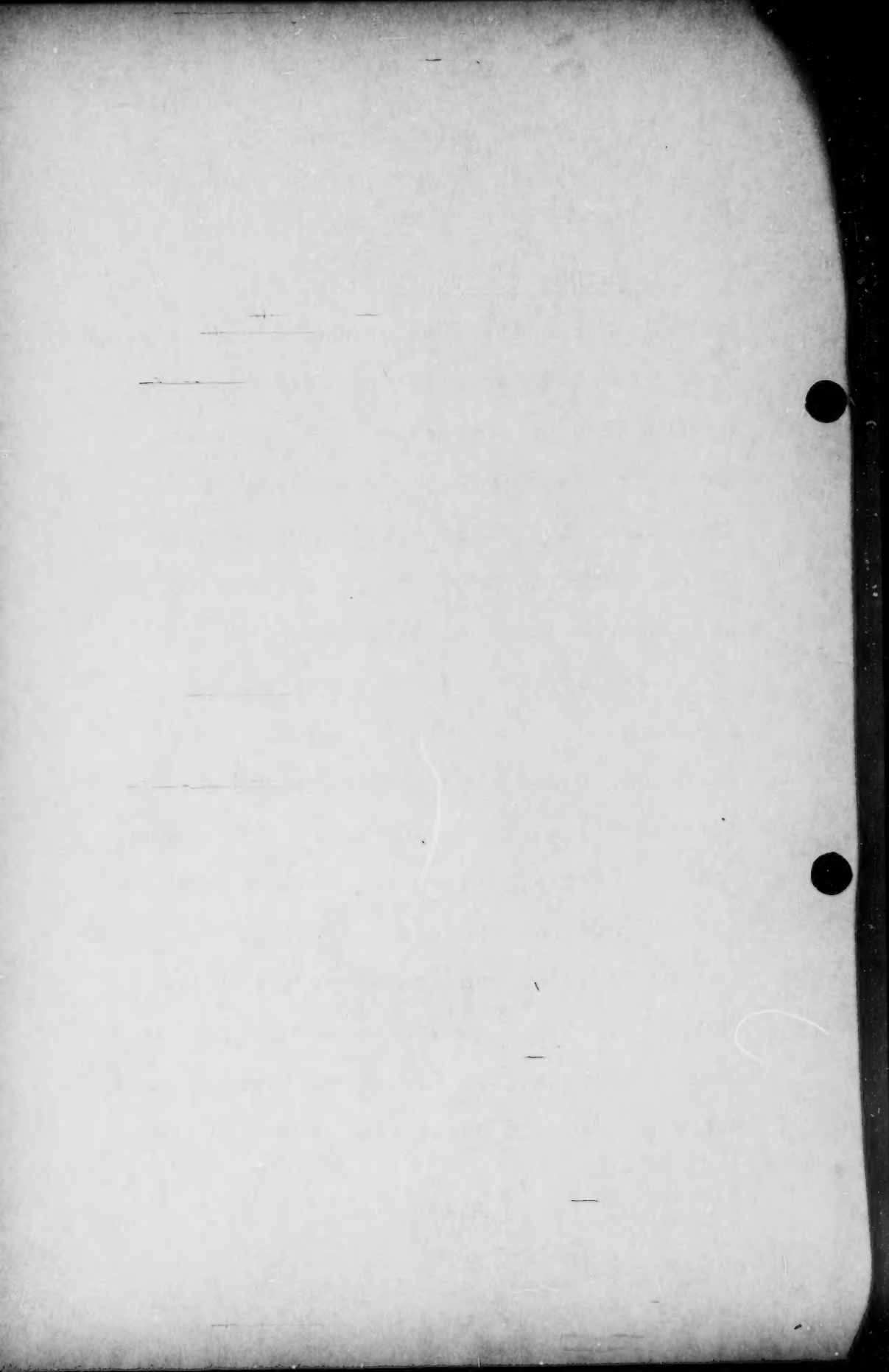
which so fundamentally affects the outcome of the adverse action. To prevent the erosion of fundamental due process rights this Court must rule that deciding officials who have no possible legitimate or compelling governmental interest to serve by Ex Parte communications with key witnesses have acted willfully in an arbitrary and capricious exercise of delegated authority impeding an employee's fundamental due process rights of having a fair opportunity to obtain evidence.

Respectfully submitted,

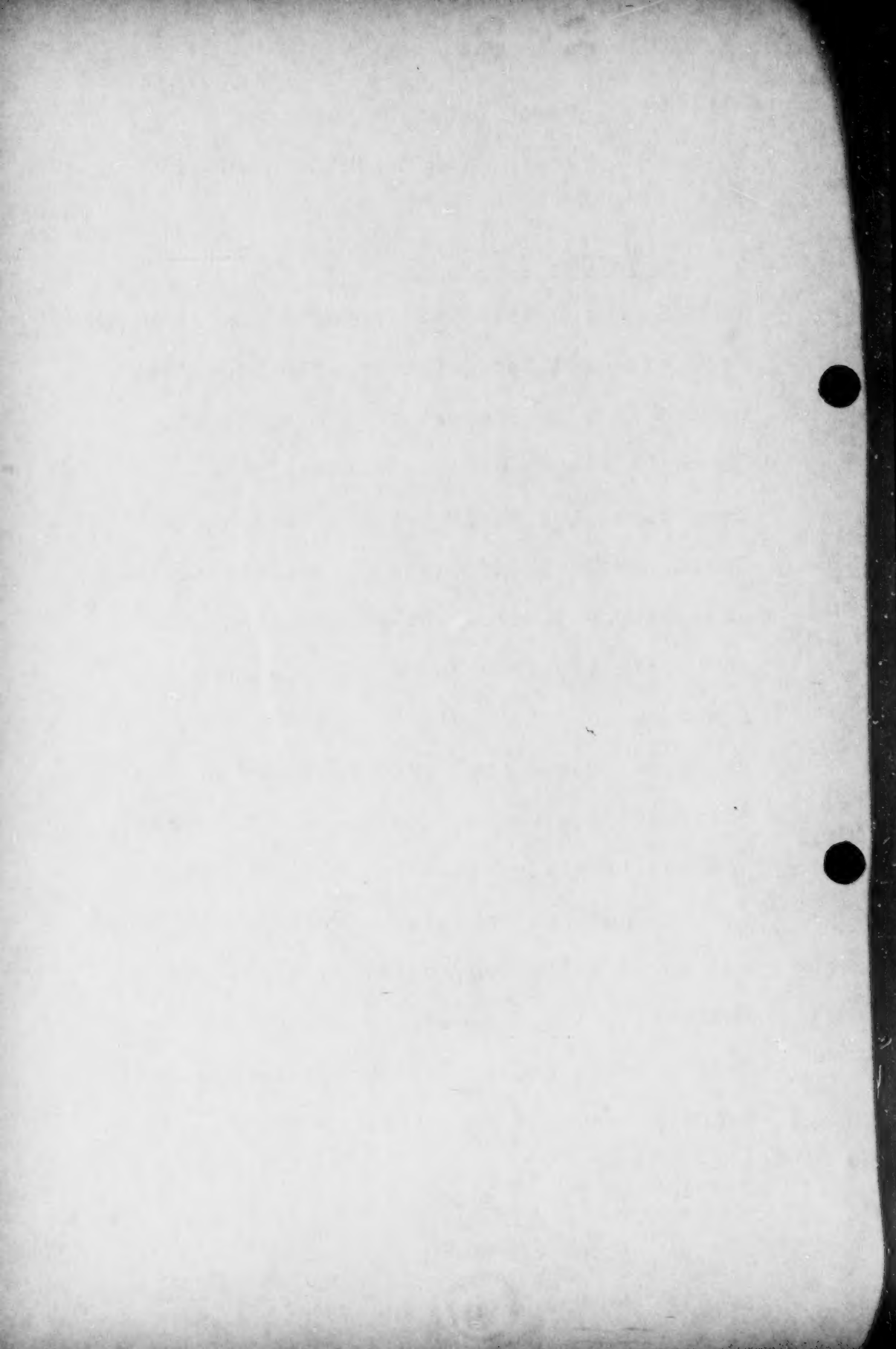
A handwritten signature in cursive script, appearing to read "Robert J. McCarty". The signature is written in dark ink and is positioned above the printed name.

Robert J. McCarty

Pro Se



APPENDIX



APPENDIX:

1. ORDER - PETITION FOR REHEARING

United States Court of Appeals
for the Federal Circuit

Case Number: 89-3103

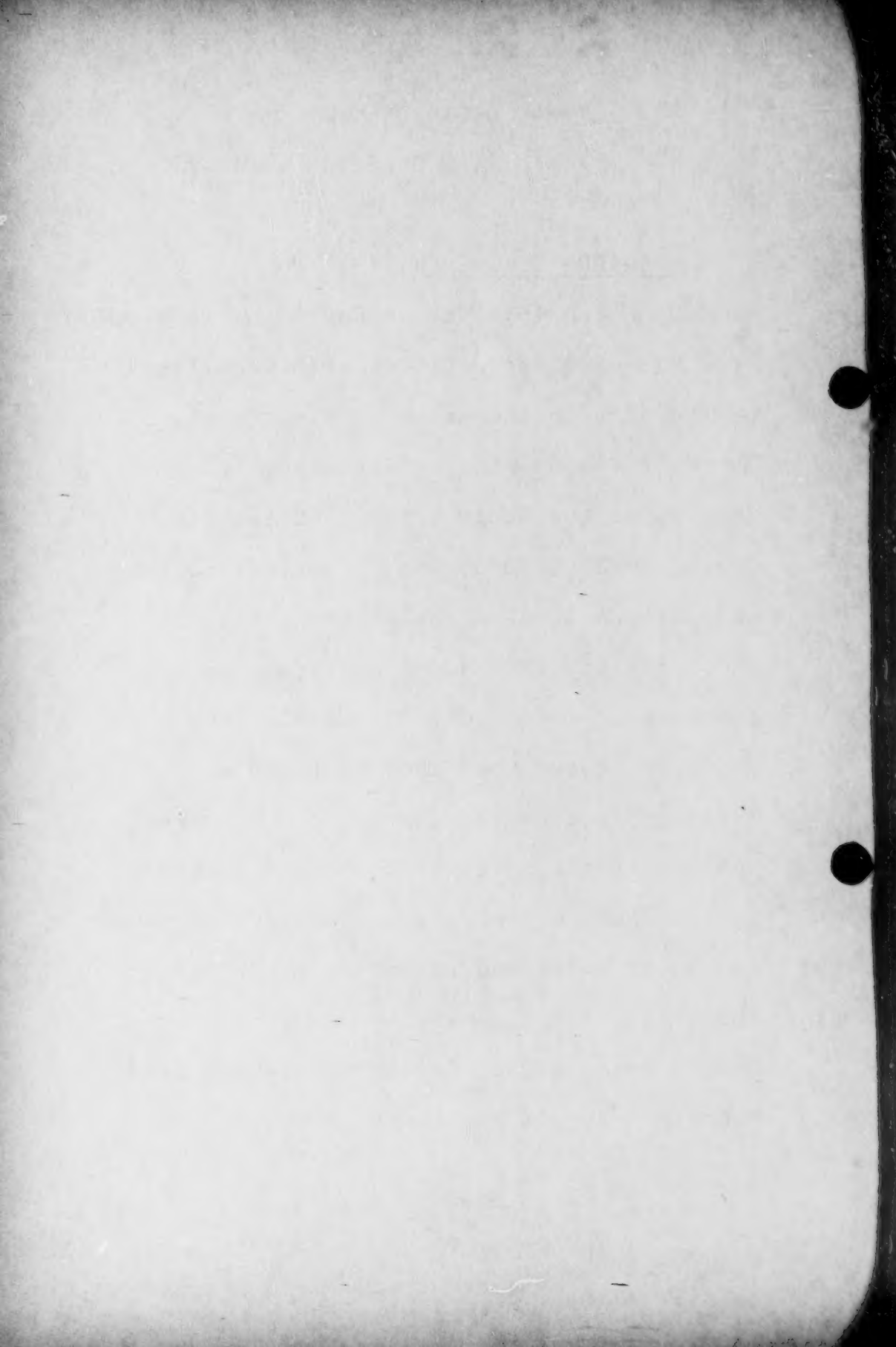
ROBERT J. MCCARTY, PETITIONER,

v.

DEPARTMENT OF THE ARMY, RESPONDENT.

DATED: AUGUST 23, 1989

FILED: AUGUST 23, 1989



2. OPINION FILED AND JUDGMENT ENTERED

United States Court of Appeals
for the Federal Circuit

Case Number: 89-3103

ROBERT J. MCCARTY, PETITIONER,

v.

DEPARTMENT OF THE ARMY, RESPONDENT.

DECIDED: JULY 17, 1989

OPINION FILED

AND JUDGMENT ENTERED: JULY 17, 1989

ISSUED AS A MANDATE: AUGUST 30, 1989

3. ORDER

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

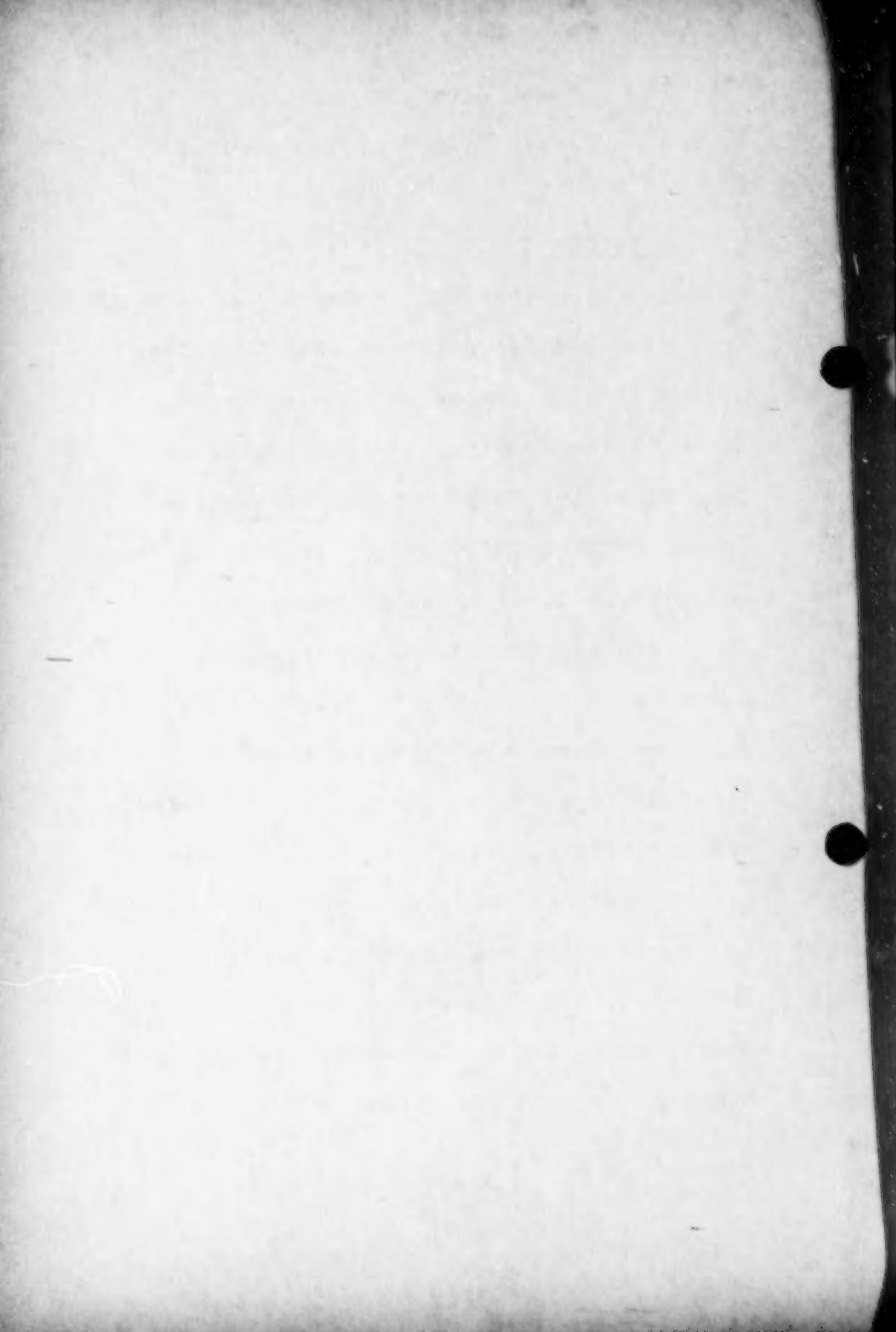
DOCKET NUMBER: SE 07528810331

ROBERT J. MCCARTY, APPELLANT,

v.

DEPARTMENT OF THE ARMY, AGENCY.

DATE: NOVEMBER 23, 1988



4. INITIAL DECISION

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER: SE 07528810331

ROBERT J. MCCARTY, APPELLANT,

v.

DEPARTMENT OF THE ARMY, AGENCY.

DECIDED: JULY 20, 1988

UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

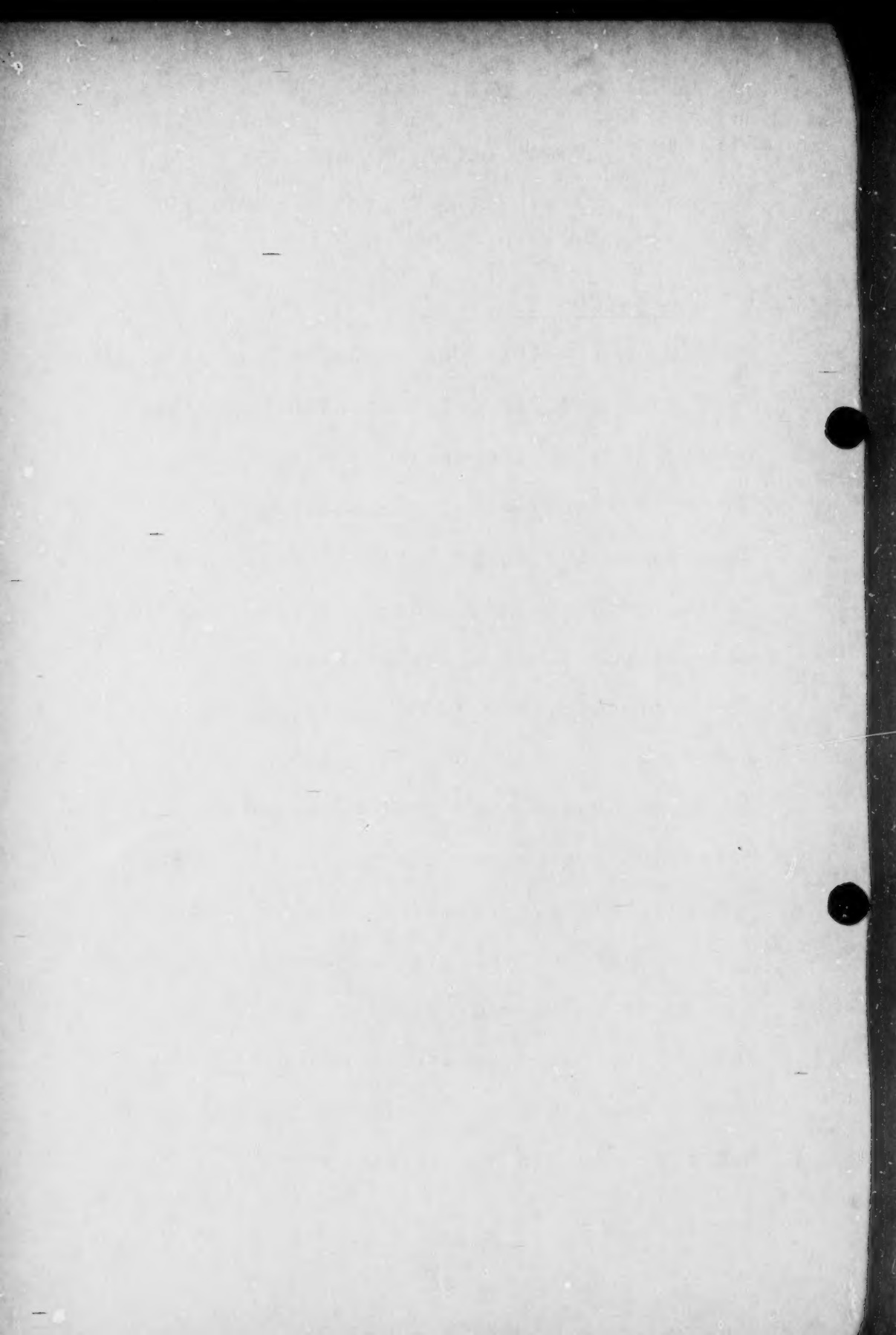
89-3103

ROBERT J. MCCARTY,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

ORDER



ORDER

Before MARKEY, Chief Judge, COWEN, Senior
Circuit Judge, and Newman, Circuit Judge.

A petition for rehearing having been
filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing
be, and the same hereby is, denied.

FOR THE COURT,

Francis X. Gindhart

Clerk

Dated: August 23, 1989

cc: ROBERT J. McCARTY

CHRISTOPHER W. DYSART

FILED

U.S. COURT OF APPEALS FOR

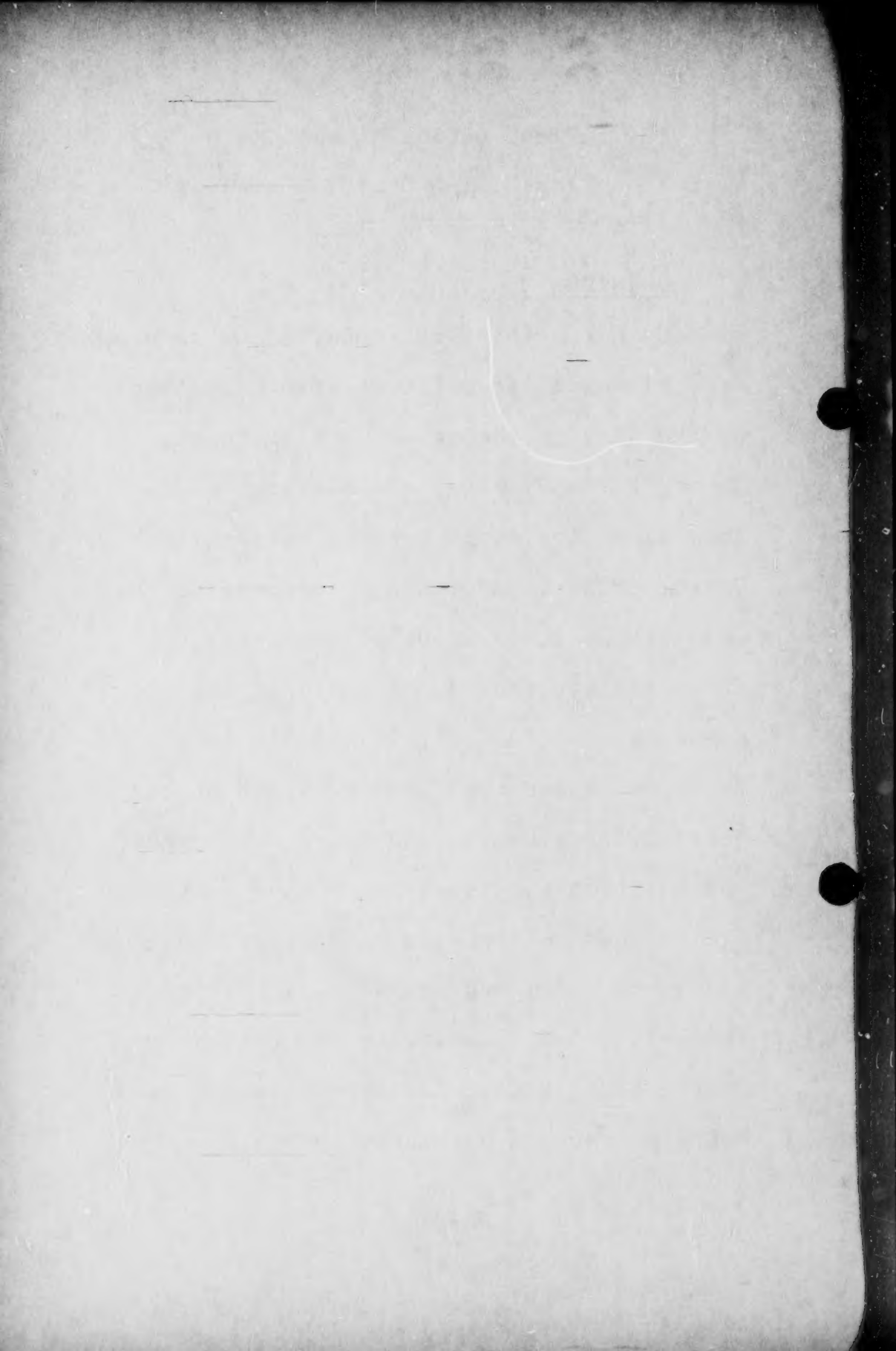
THE FEDERAL CIRCUIT

AUG 23 1989

FRANCIS X. GINDHART

CLERK

MCCARTY V ARMY, 89-3103



UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3103

ROBERT J. MC CARTY, Petitioner,

v.

DEPARTMENT OF THE ARMY, Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS

PROTECTION BOARD

in CASE NO(S). SE07528810331

This CAUSE having been heard and considered,
it is

ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED JUL 17 1989

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: AUGUST 30, 1989

UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3103

ROBERT J. MC CARTY, Petitioner,

v.

DEPARTMENT OF THE ARMY, Respondent.

DECIDED: July 17, 1989

Before MARKEY, Chief Judge, COWEN,
Senior Circuit Judge, and NEWMAN,
Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (board), SE07528810331, affirming the Department of the Army's removal of Robert J. McCarty (McCarty) for misconduct including failure to act on knowledge of test fraud and providing a

false statement of material fact, is
affirmed.

OPINION

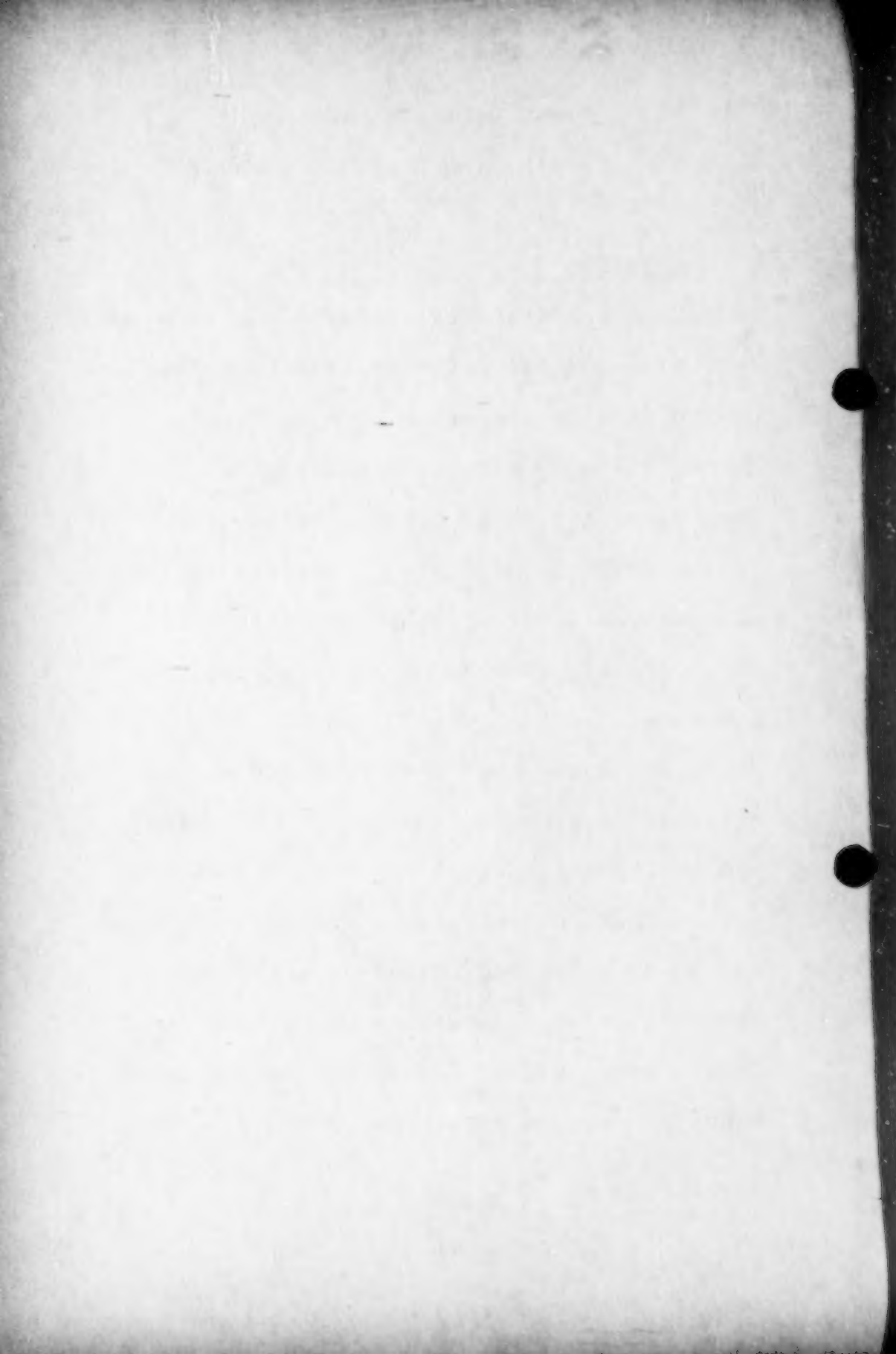
Substantial evidence supports the finding that McCarty engaged in misconduct justifying his removal from the service. See Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987); Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984). We agree with the administrative judge that McCarty's assertion that his job responsibilities could have been better defined does not justify his misconduct or save him from removal of it.

McCarty failed to convince us that the board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or obtained without procedures required by law, rule, or



regulation having been followed, or unsupported by substantial evidence. Accordingly, we affirm on the basis of that thorough decision. 5 U.S.C. 7703(c) (1982); see Hayes, 727 F.2d at 1537.

McCarty's assertions about the composition of the board and his absence from two investigatory proceedings may not be raised for the first time on appeal. See Meglio v. MSPB, 758 F.2d 1576, 1577 (Fed. Cir. 1984).



UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT J. McCARTY, Appellant

v.

DEPARTMENT OF THE ARMY, Agency.

DOCKET NUMBER SE07528810331

DATE: November 23, 1988

Sidney J. Strong, Esquire, Seattle,
Washington, for the appellant..

CPT John M. Dykstra, Esquire, Camp Zama,
Japan, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

- ORDER -

After full consideration, the Board
DENIES the appellant's petition for review
of the initial decision issued on July 20,
1988, because it does not meet the criteria
for review set forth at 5 C.F.R. 1201.115.
This is the Board's final order in this
appeal. The initial decision in this

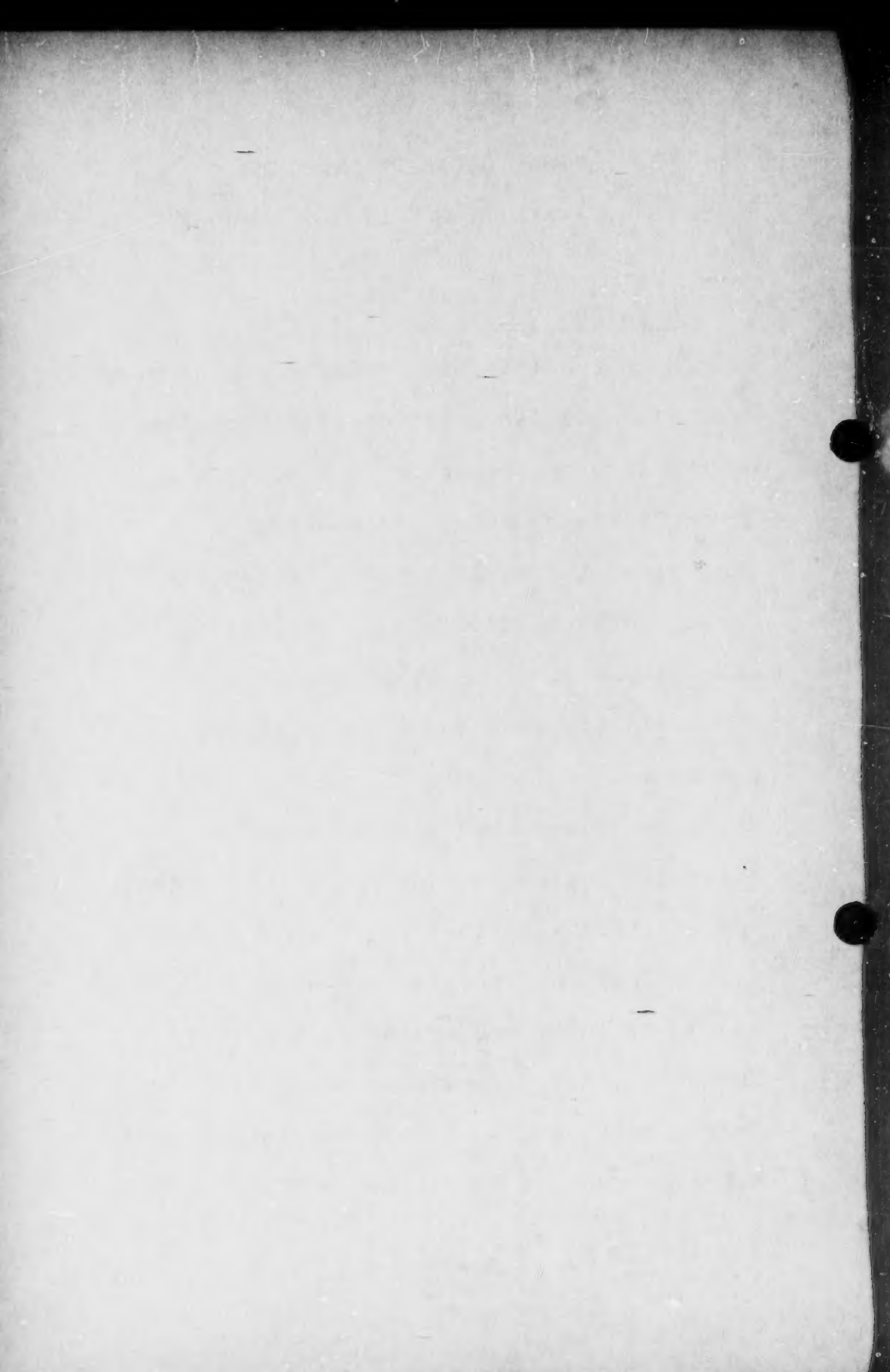
appeal is now final. 5 C.F.R. 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. 7703(b)(1).

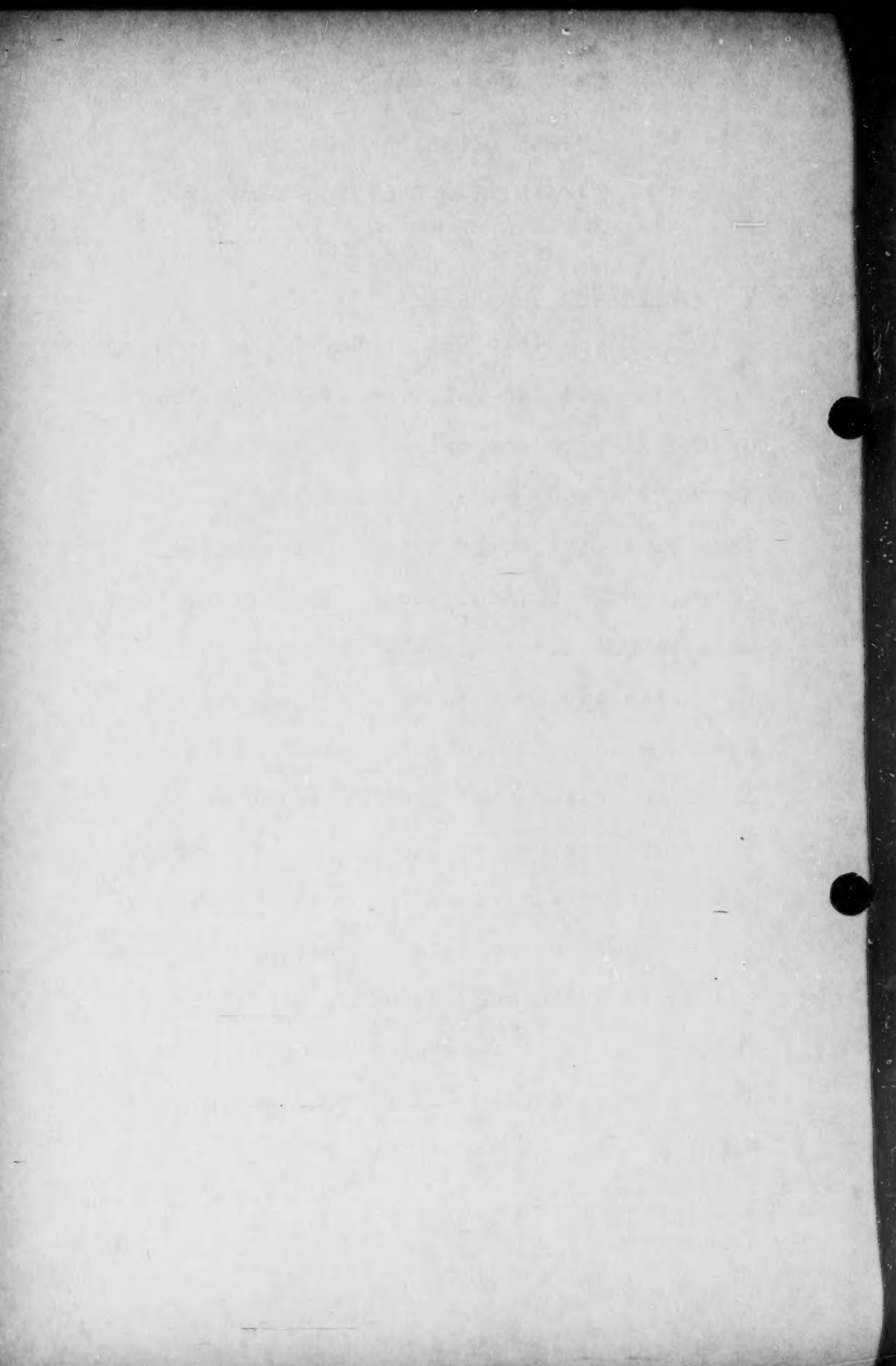


FOR THE BOARD:

Robert E. Taylor

Clerk of the Board

Washington, D.C.



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

ROBERT J. MC CARTY, Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

DOCKET NUMBER SE07528810331

DATE: July 20, 1988

Sidney J. Strong, Esquire, Seattle,
Washington, for appellant.

CPT John M. Dykstra, Esquire, Camp Zama,
Japan, for the agency.

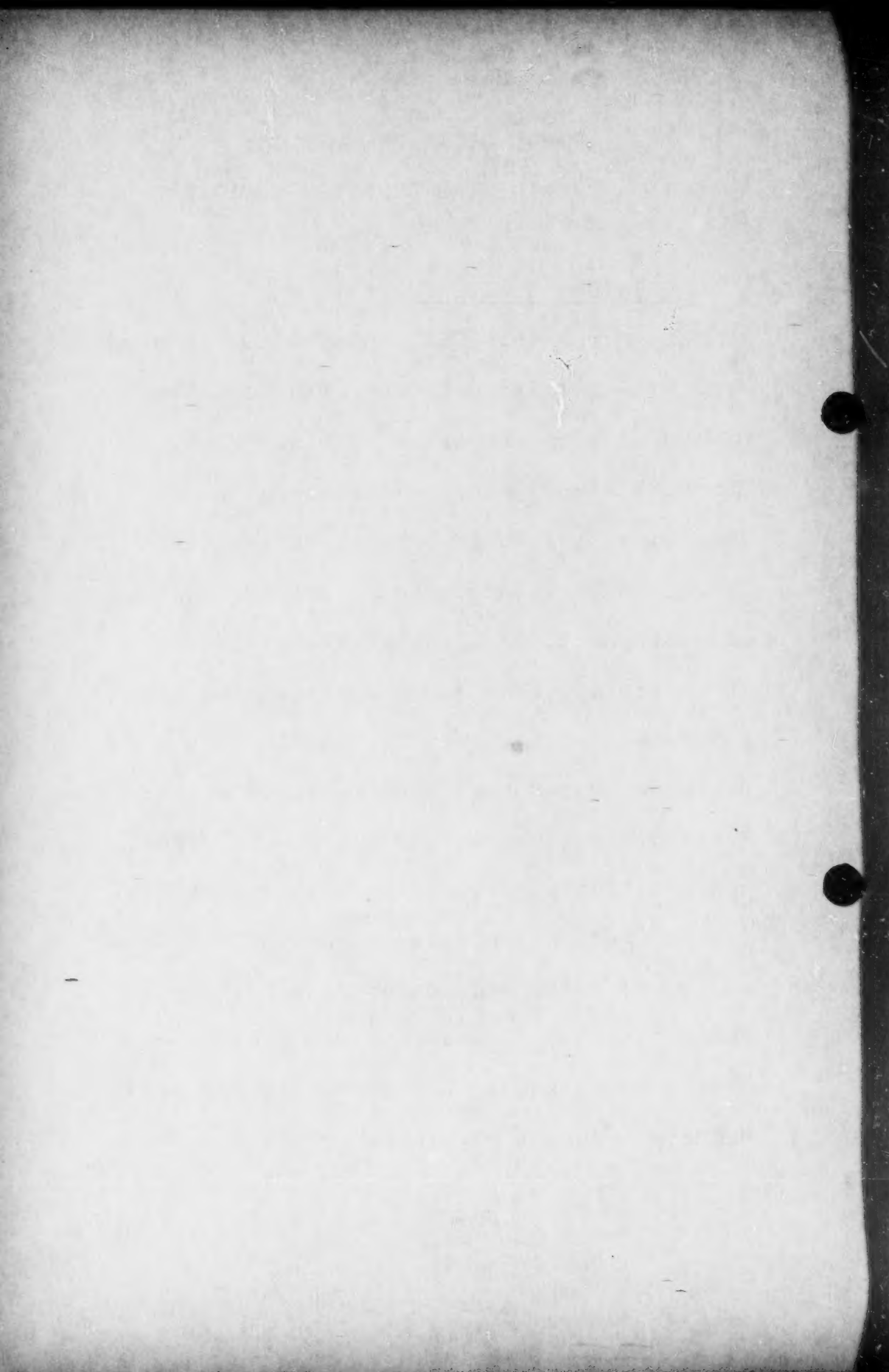
BEFORE

John W. Tapp, Administrative Judge

INITIAL DECISION

I.

On March 22, 1988, Robert J. McCarty, appealed to the Merit Systems Protection Board (the Board) from the action of the Army removing him from his position as Director of the Academic Training Center



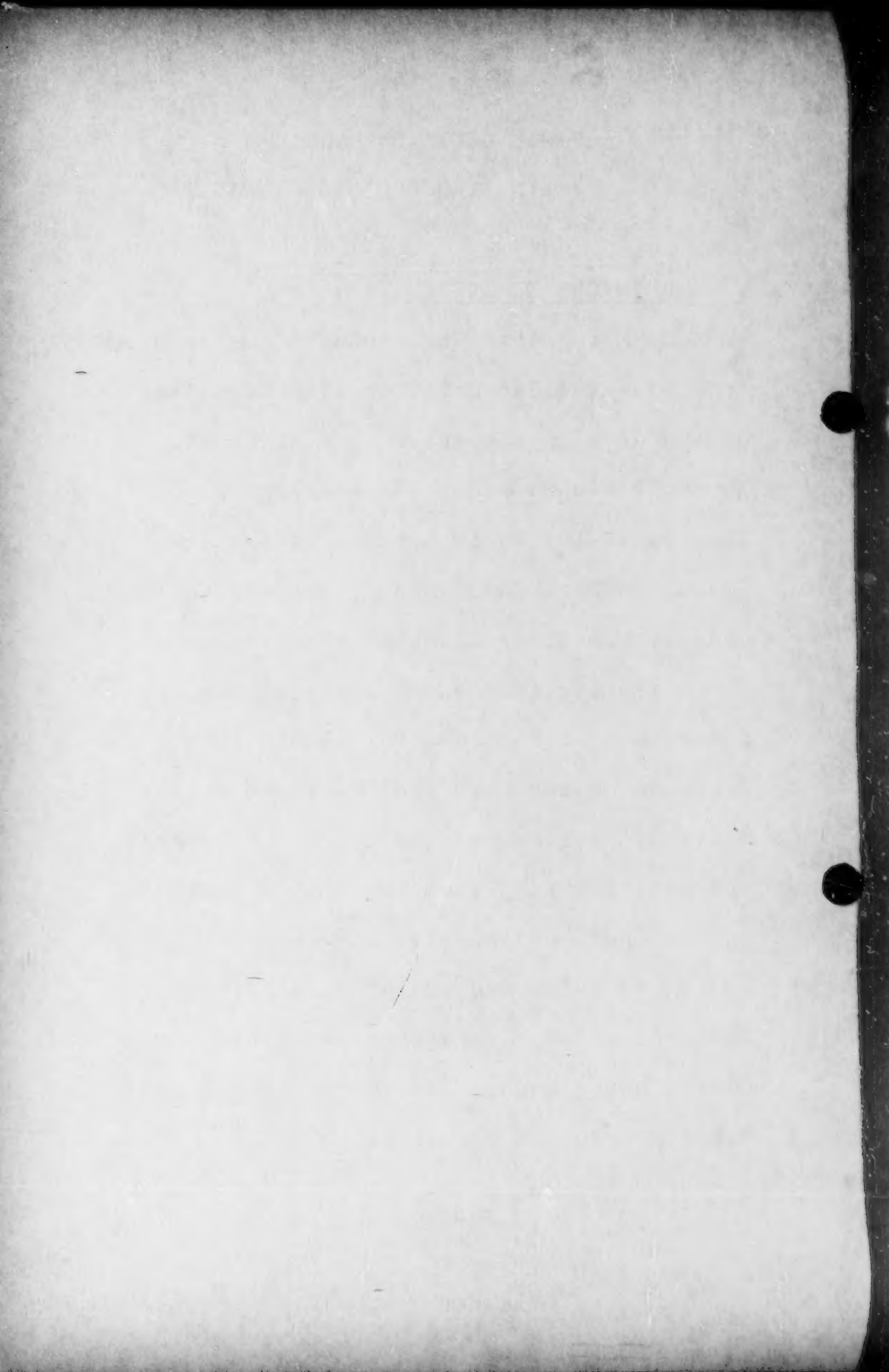
at Camp Zama, Japan, effective March 18, 1988, based on four charges of misconduct. The Board took jurisdiction over his appeal pursuant to 5 U.S.C. 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a). Appellant declined a hearing, so his case was decided on the written record.

For the reasons explained below, the agency's action is AFFIRMED.

II. Analysis

A. Agency's Initial Burden

To sustain an adverse action before the Board, an agency must initially establish, by a preponderance of the evidence, that there is a factual basis for the conduct charged and that punishment of some nature, based on the proven conduct, promotes the efficiency of the service. See 5 U.S.C. 7513(a) and 7701(c)(1)(B). The latter



determination is referred to as the "nexus requirement." See, e.g., *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984), *aff'g* 15 M.S.P.R. 378 (1983).

B. Background to Conduct Charged

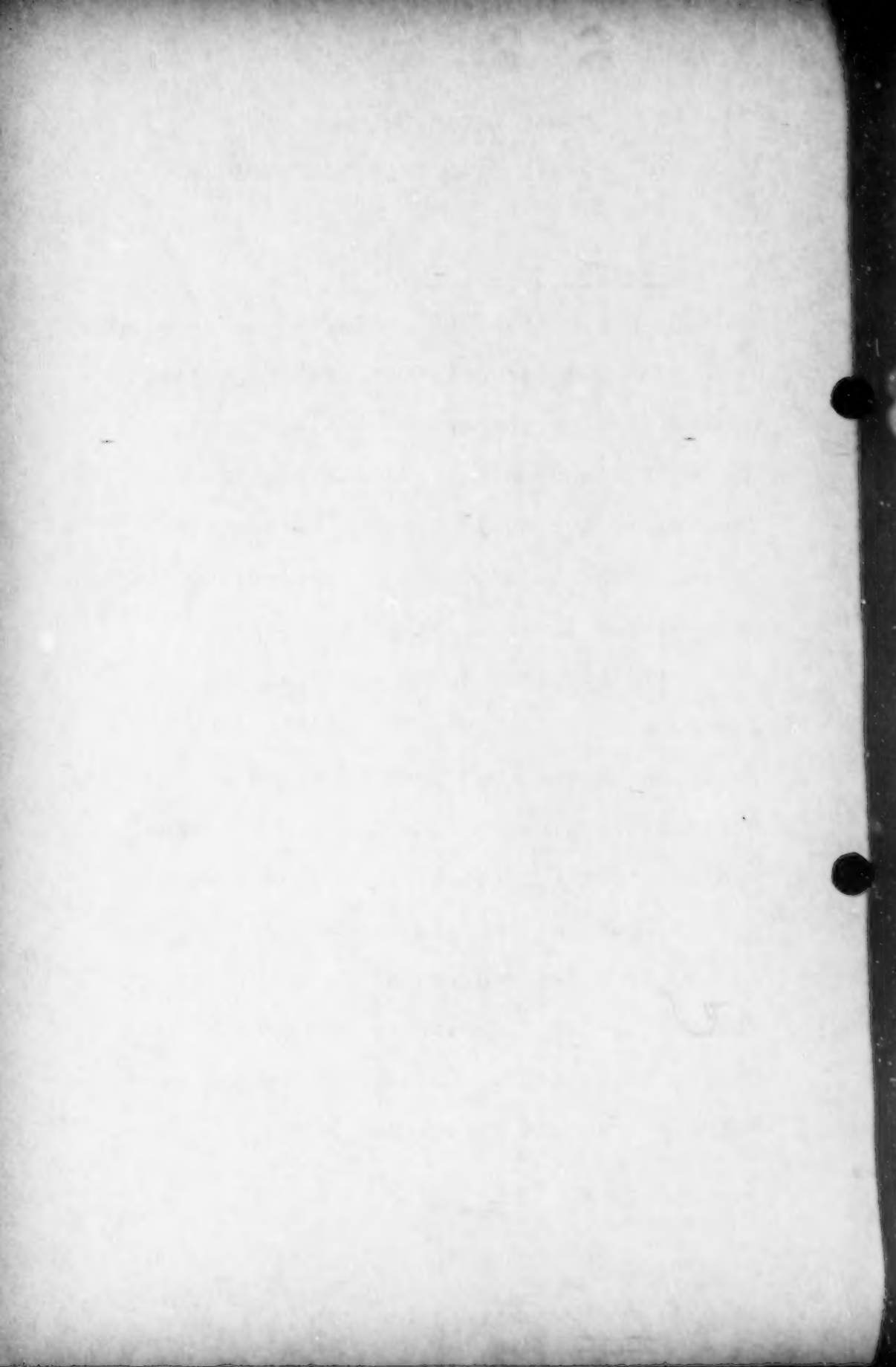
Appellant became the civilian Director of the Academic Training Center (Educational Services Officer, GM-13) at Camp Zama, Japan in January 1985. The Academic Training Center (referred to in the record and hereinafter as "the ATC" or "the Center") provided a broad variety of educational services to soldiers and civilian employees. One of those services was testing and certification of military personnel. Appellant's job was to run the entire operation. See "Job Description" and "Civilian Performance Plan," agency tab K, Board file #1.



He was joined at the ATC in 1986 by Major Joseph Craig who was the Training Officer "on the military side" of the operation. Craig supervised military testing and reported the Center's statistical results to the Base Commander, Colonel Robert Council.

Both appellant and Craig reported to the head of the Directorate of Plans, Training, and Security (DPTS), Lieutenant Colonel James Roy. Their exact relationship within the Center was not totally clear.

There was an expectation that the Center would produce "good statistics," i.e., ensure that a good percentage of it's testees would pass the Armed Forces Classification Test (AFCT). The evidence indicates that, in this climate, MAJ Craig began to suggest improper ways of



improving scores and pressured subordinate Test Control Officers (TCO's) to alter answers on the General Test (GT) portion of the AFCT.

There is no claim that appellant personally engaged in this kind of pressure or impropriety. The agency's first charge is that appellant became aware of it, however, and failed to report or otherwise act upon his knowledge, which was his responsibility as the ATC Director. The agency's second charge is that appellant made a false statement to an official investigator during the CID investigation of that matter.

While these events were unfolding, MAJ Craig's military retirement was becoming imminent. A move developed to create a post-retirement civilian

position for him within the Center. Appellant assisted MAJ Craig in preparing his application for the position. The third charge is that appellant performed this work on the agency's computer and that he did it, a total of 40-50 hours in all, both during duty hours and after hours with the time charged back to the agency as compensatory time. The agency maintains this was misuse of government time and equipment for personal matters.

Fourth, and finally, the agency charged that, during the course of these events, appellant made a series of false and malicious statements about co-workers, supervisors and other government officials with the intent or effect of harming their reputation or authority.¹

C. Proof of Conduct

Charge #1

Failure to Act on Knowledge of Test Fraud

There is ample evidence to support this charge. The most direct and critical part of this evidence relates to events beginning on April 14, 1987, but there is evidence that, even earlier, appellant was "looking the other way" while MAJ Craig was engaging in improper behaviour regarding test scores.

In one of his sworn statements, appellant acknowledged that Craig came directly to him with the idea that the test vocabulary words should be included in preparatory or retest courses (so that testees would be familiar with them ahead of time) and/or that the supervisory TCO, Timothy Isenhardt, should be directed to give him a copy of the AFCT itself.²

Isenhardt was at Camp Zama as a TCO from

February 1986 to April 1987. Appellant also acknowledged that both Isenhardt and William Townsend (who became an Assistant TCO in December 1986) had told him that they had been "pressured" by Craig to raise scores. Appellant described one instance when Townsend came to him about Craig's pressure. According to appellant, he asked Townsend if he wanted to file a formal complaint and Townsend "kind of walked out the door shaking his head."

Michael Triem became a TCO in June 1986. In a sworn statement dated August 21, 1987, he related an incident in March 1987 involving himself, Craig, and appellant in appellant's office.³ Triem was going to test a group of soldiers and Craig said, "Make sure these people pass." After Craig left, Triem asked appellant if he was being asked to cheat and appellant responded with words to the effect that as

far as he (appellant) was concerned, the conversation never took place. Triem then went to Craig and asked him the same question. According to Triem, "Craig patted me on the back and said, 'Mike, I would never ask you to do that'."⁴

In that same statement, Triem related an incident where Craig brought him a test answer sheet to verify on which it appeared that the original scores had been erased and higher ones entered. This seemed "odd" to Triem, so he took the sheet to appellant who merely indicated that whoever the original scorer was just couldn't add.⁵

In early April 1987, James Kardeke became the Supervisory TCO. On April 14, 1987, he observed Townsend changing an answer sheet to raise a GT score. Townsend acknowledged the impropriety

but maintained it was pursuant to Craig's exhortations and implied threats to his (Townsend's) job security.⁶

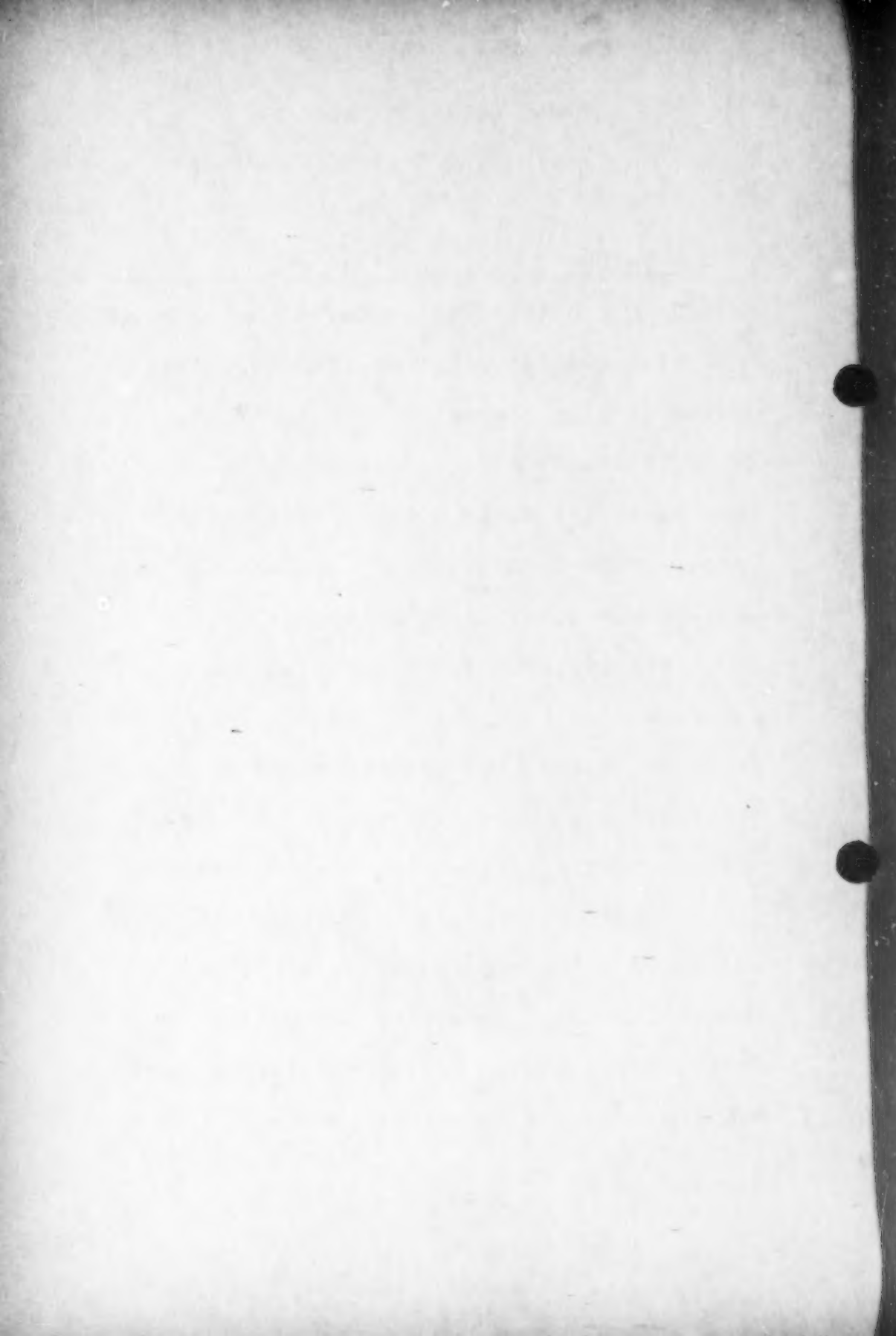
Kardeke went to appellant, told him what he had observed, and asked if it was Center policy. Appellant told him that anyone caught cheating would be fired and asked if he wanted to make a formal complaint against Townsend. Kardeke said he wanted to check with Craig first.

Craig told Kardeke that cheating wasn't condoned. However, the response of the two men (appellant and Craig) led Kardeke to conclude that cheating was the policy but it was clear that "everything was going to be kept in house." Kardeke then returned to appellant and indicated that he did not wish to make a formal complaint. According to Kardeke, appellant at that time acknowledged he

knew there was cheating was going on but, if confronted, he (appellant) would deny knowledge.⁷

Kardeke wrote a Memo for the Record (MFR) at the time (agency tab YY) and the next day convened a meeting with Townsend, Triem, and Carl Peterson who was Chief Counselor at the Center. Kardeke advised that he had caught Townsend cheating -- which Townsend admitted -- and that as long as he was TCO, there was to be no cheating.⁸

According to Triem, after this meeting, he told appellant and Craig what Kardeke had said about Townsend cheating, and appellant responded to the effect that Kardeke would have to be able to prove it. See Triem's August 21, 1987, sworn statement, agency tab KK, Board file #2.



By April 1987, higher-level military officials had noted a "phenomenally high success rate" in the AFCT retest statistics for the Center and John Sienrukos was asked to look into the matter. According to Sienrukos, both:

Mr. McCarty and Major Craig assured me that nothing illegal was going on, but that it was more likely that the high success rate could be attributed to the fact that they both took a personal interest in each soldier to ensure that he/she was ready to take the AFCT test before being recommended to do so.

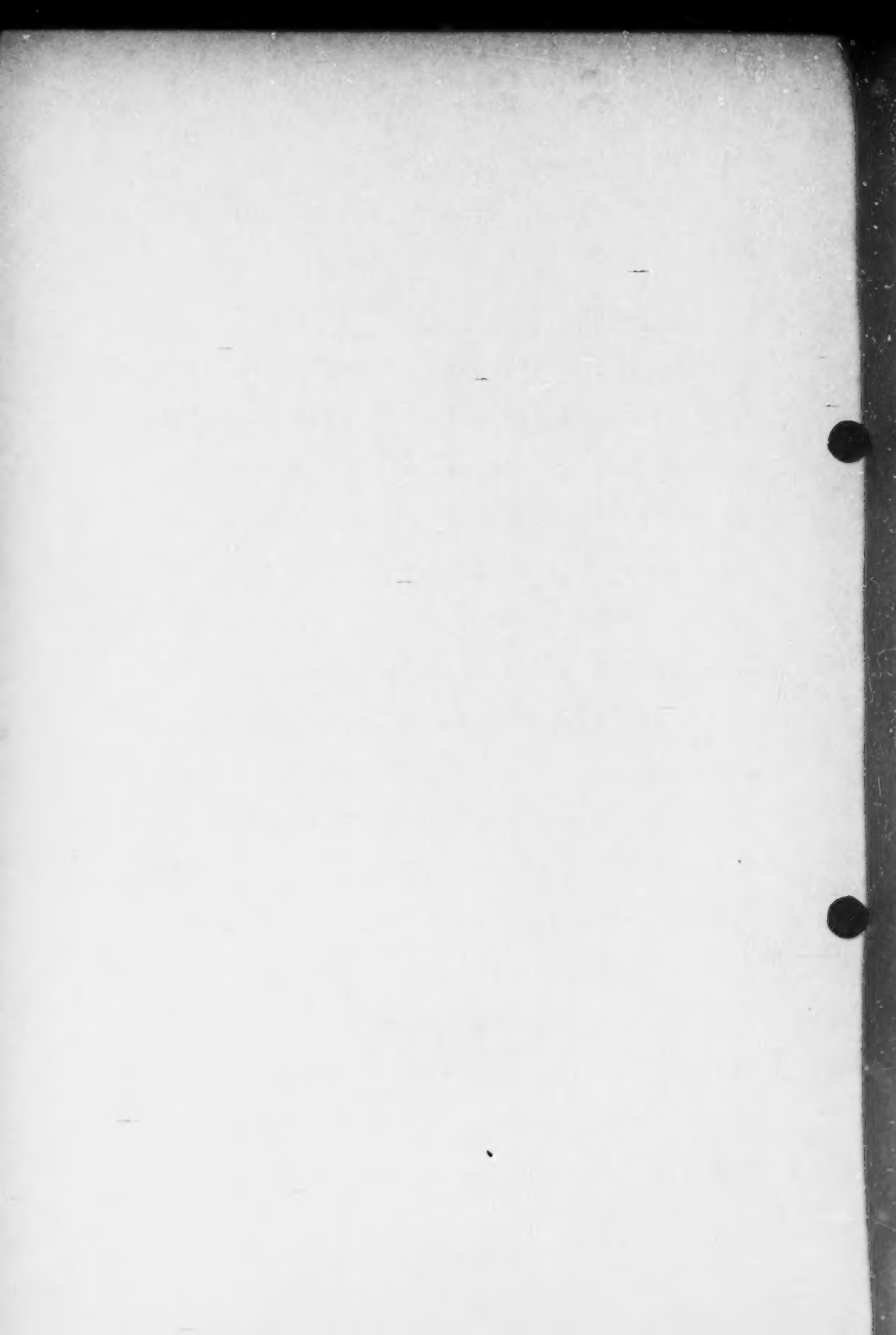
Based on the high scores and "rumors" of falsification, however, Sienrukos recommended an investigation. (Agency tab SS). The CID investigation ensued.

If the foregoing witnesses' statements leave any doubt as to appellant's guilt on this charge, his own statements to the CID agents and his replies to the proposed adverse action resolve that doubt.

My own examination of these documents reveals a mixture of statements that are mostly inculpatory, often evasive, sometimes inconsistent, and frequently irrelevant.

In his first three sworn statements to the CID agents in August and October 1987,⁹ appellant admitted his knowledge of all the operative events but basically blamed Craig and maintained that, as a civilian employee, he was unable to report any wrongdoing because it was clear that Craig was being given "full rein to do whatever he wanted" by the military superiors to which they both had to report. By the time of his third statement (tab FF), appellant stated clearly:

I didn't want to have anypart [sic] of what was going on. I disassociated myself from the whole thing, because I didn't want to get involved. There wasn't anyone for me to report it to anyway.



Although I never altered a test, directed or observed anyone alter a test I knew it was occurring. However, like I stated before, I disassociated myself from it in order to survive. When I state that I knew the test results were being altered, this was at a subconscious level. If the tests were being altered I didn't want to have anything to do with the test at all.

In subsequent oral and written replies to the proposed adverse action, during January and February 1988,¹⁰ appellant repeated many of his earlier arguments, maintained the CID agents manipulated and distorted his signed statements, and attacked the decision-maker taking his response, Colonel Roy C. Berry, on various grounds. For the first time, he indicated that he had failed to appreciate the significance of the improprieties due to a preoccupation with his son's medical condition.¹¹ See January 29, 1988, "Memorandum" (agency tab T).

In his final oral reply on February 19, 1988 (tab M), he claimed he had not been given performance standards and made an issue of that, tying it to his claims that Craig was the de facto director of the Center and that he had made sure the improprieties were reported to Craig. However, he also acknowledged that, in retrospect, he should have pursued Kardeke's information about Townsend's cheating:

As to whether I construed that as someone tellin [sic] me that test scores were being altered, I can honestly say today, yes I do. But at that period of time in my life, no I didn't. As to that causing me to think that possibly something was wrong, and that I had an obligation to report that to someone, in retrospect, there's no question. But at the time, I didn't think that.

In retrospect, I do feel I had an obligation to report that. At that time, at an unconscious level, all this information was available to me, but I couldn't piece it together. My concerns were not on testing, they were on my son. As to

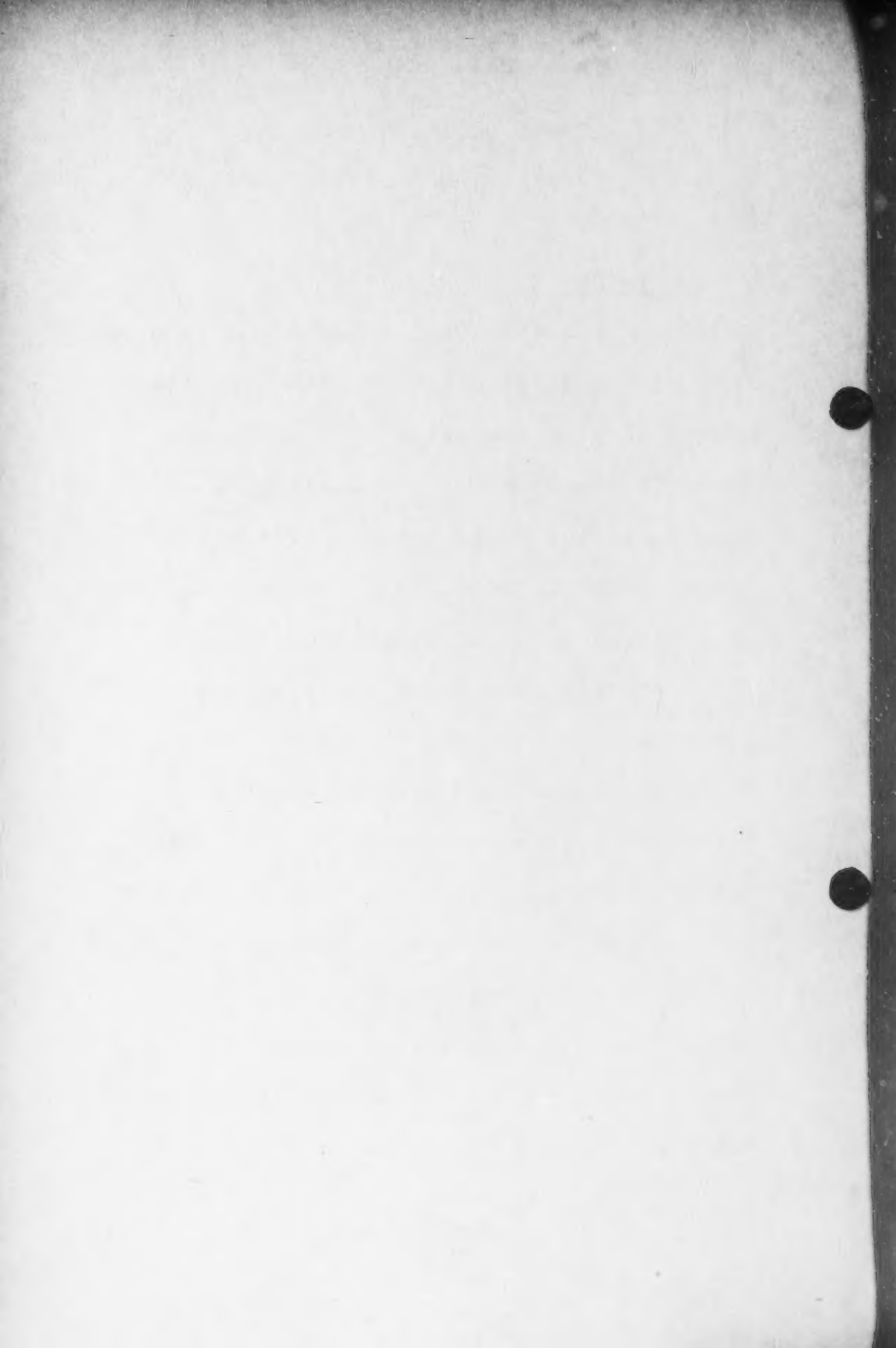
whether I was thinking about my job at all, not in the sense that I could piece information like that together.

The only thing I can say in all honesty is that I should have done something, in retrospect.

See oral reply transcript, pp. 5-6 agency tab M.

I just cannot accept any of appellant's explanations for his failure to act on his knowledge of test fraud. They are all unconvincing and at variance with either each other or other more credible evidence.

There is no indication that his son's accident, though tragic and no doubt deeply disturbing, directly affected appellant's work or functioning in any specific way. Moreover, appellant had significant evidence of improprieties well before the accident and did nothing



in response.

Although MAJ Craig did appear to enjoy a special position at the ATC by virtue of his military status, he was not the Director on paper or in fact. More importantly, the evidence allows no other conclusion but that appellant failed to act upon the improprieties instigated by Craig because they resulted in the appearance of better performance for at least one aspect of his own total operation. The relationship between appellant and Craig was symbiotic in many ways.

Appellant ignored clear, blatant indications of wrongdoing and trusted that subordinates, caught between his own inaction and Craig's direct pressure, would be afraid to themselves come forward. As the Director of the ATC, it

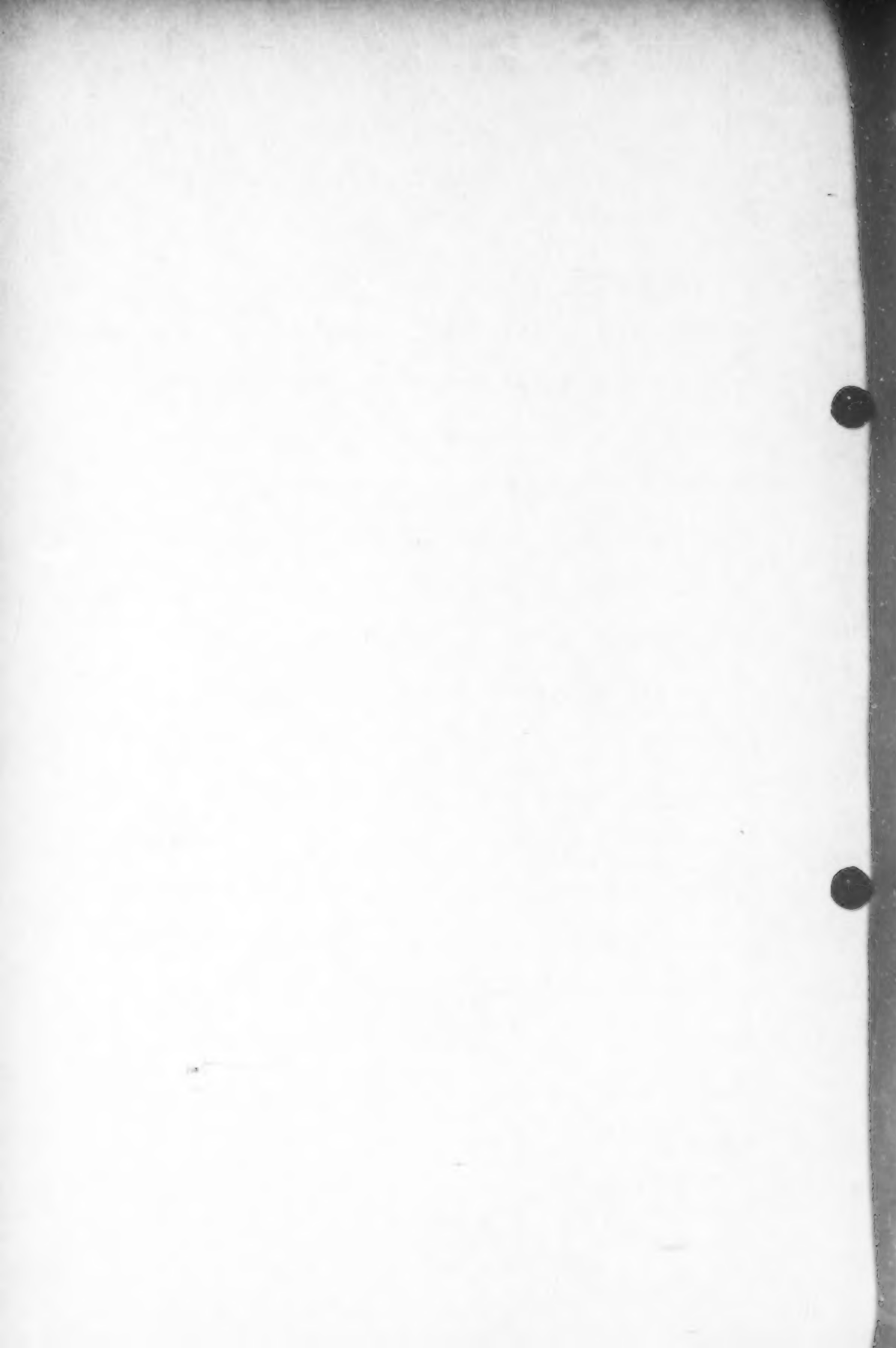
was appellant's responsibility to ensure the integrity of the operation. He failed to do so in a most fundamental way. I find agency charge #1 is SUSTAINED.

Charge #2

False Statement of Material Fact

The agency's second charge is that appellant made a false statement of material fact when, in his sworn statement of October 21, 1987, to CID Special Agent Tilford Flowers (tab HH), appellant stated he did not become aware of cheating at the Center until August 23, 1987, when he read Townsend's sworn statement.¹² Based on the extensive findings in my discussion of the preceding "failure to report" charge, I find that this charge must also be sustained.

The actual question and answer



involved is as follows:

Q: When did you find out that test results were being altered?

A: Sometime around the 23d of Aug 87, while in Korea, I read the statement of TOWNSEND wherein he admitted to altering test results.

As I have previously found, appellant clearly knew at least as early as April 1987, based on explicit statements by Kardeke and Triem, that Townsend had altered at least one test result. At the time of those explicit statements, appellant had significant cause to believe that MAJ Craig had been actively pressuring subordinates to engage in various improprieties, including alteration of test results, going back to 1986. There is just no question that appellant, as charged, intentionally misrepresented the date upon which he became aware of altered test results.

This statement was material for

several reasons. It was relatively early in the CID investigation and was a misrepresentation of the manner in which cheating at the Center came to light. By it, appellant sought to limit the nature and extent of his own involvement in the matter and, at the same time, shift blame to others.

Therefore, I find that charge #2 is SUSTAINED. See, e.g., *Boyd v. Department of Justice*, 14 M.S.P.R. 427, 429-30 (1983), *aff'd*, 727 F.2d 1117 (Fed. Cir. 1983) (Table) (charge of lack of candor during course of investigation supported by preponderance of the evidence).

Charge #3

Misuse of Government Time and Property

As previously noted, an attempt was made to keep MAJ Craig on at the Center after his military retirement by creating

a civilian position, similar to the one he performed as a military member, for which Craig could apply and presumably be selected.

The agency's third charge is that appellant used the Center's computer to assist Craig with his job application, a Standard Form 171 (SF-171), and that he did it during both duty hours and after hours with the time charged back to the agency as paid compensatory time. Appellant admits this conduct.

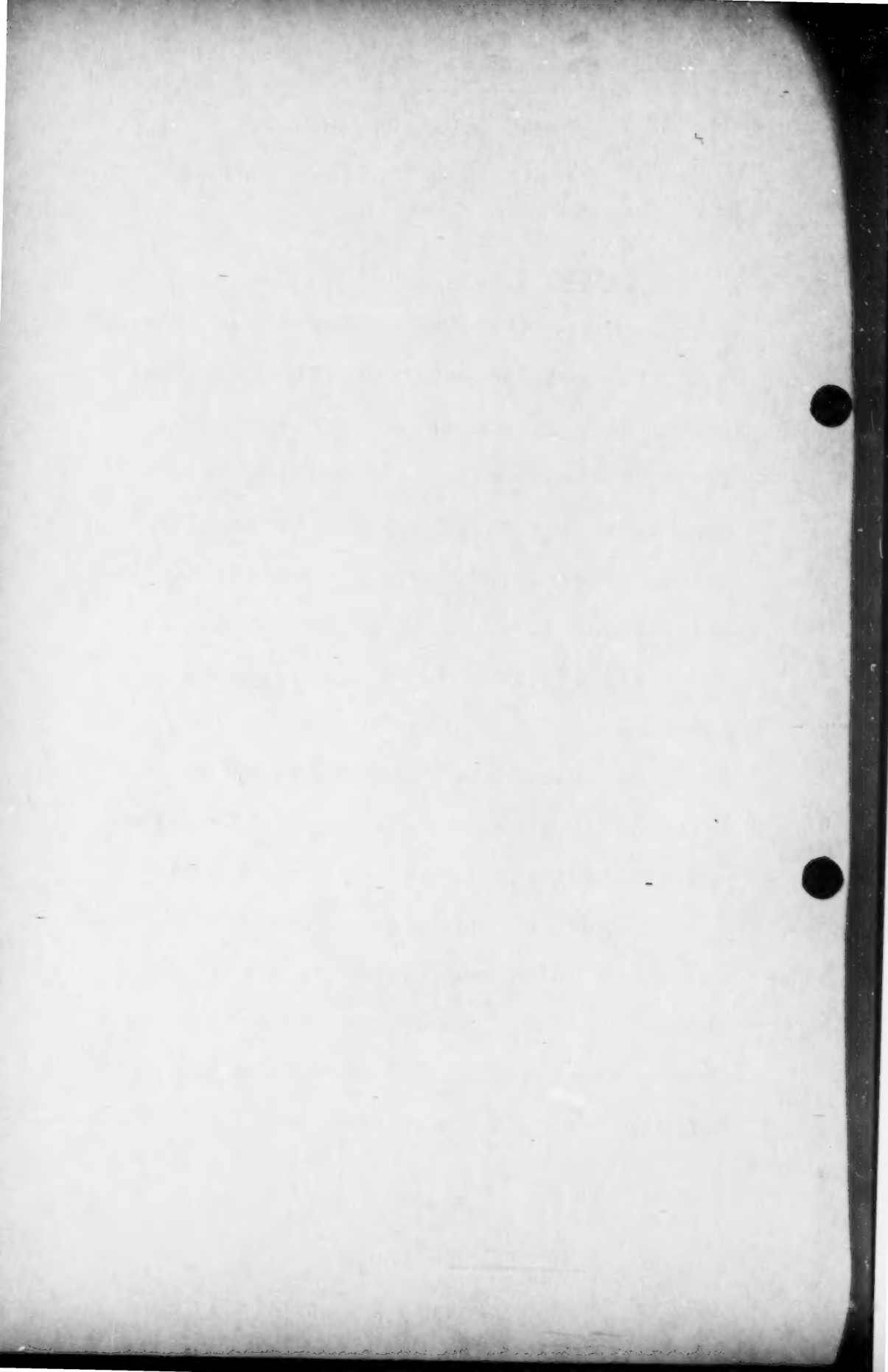
In his December 4, 1987, sworn statement to CID Agent Warren Cox (tab BB), appellant stated that Craig didn't know how to do the application, so"

... I finally decided to do it myself. I did his SF 171 on government time, and sometimes worked after duty hours revising it and making it the best product I could do. It was 35-40 pages long and covered his entire military

career. The time I worked after normal duty hours, I put on my time cards as "Compensatory Time", and I would say that it took 40-50 hours to prepare it. I used the same AATD computer to prepare Craig's SF 171 as I did to write the GS-11 job description. I really didn't mind doing it, because I knew that the final choice of who was selected was mine.

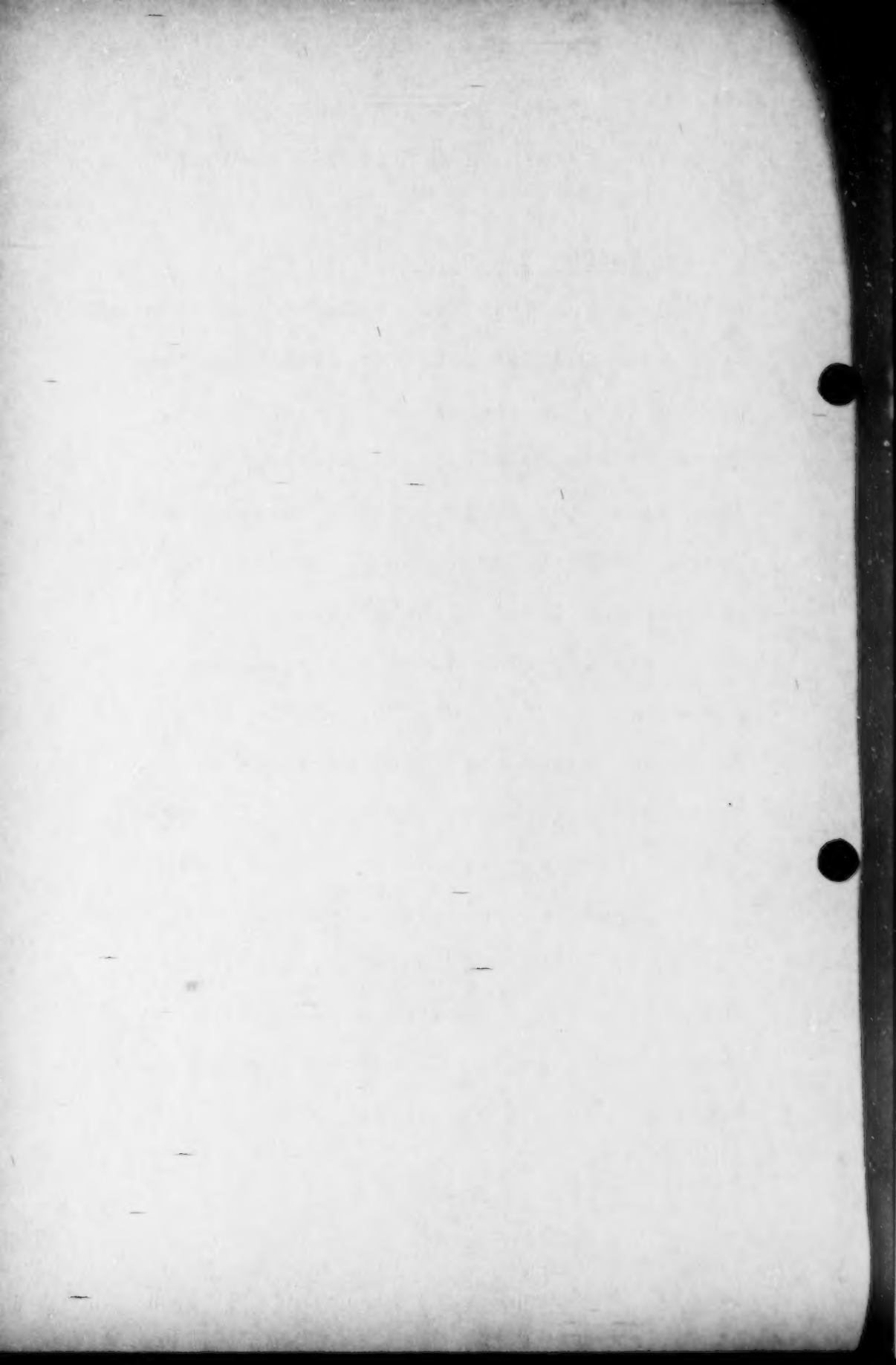
See also transcript of February 8, 1988, oral reply, p. 4 (tab Q) ("Using the government computer, there's no one denying that.").

Appellant defended this behavior in various ways, however, none of which are supported by any evidence, other than appellant's word which I do not find credible. Appellant first maintained that he was "tasked" to do Craig's application by LTC Roy and COL Council. That claim is contradicted by other evidence. In a sworn statement to CID, dated December 8, 1987, Roy indicated he might have



suggested appellant "help" Craig with his application but he never "directed or ordered" him to help. (Agency tab AA, Board file #2). In a March 3, 1988, MFR, Nicholas Conti noted that appellant asked if he (Conti) remembered a meeting where COL Council instructed him (appellant) to prepare Craig's SF-171. Conti stated he was "never present at such a meeting and the subject was never brought up in my presence." (Agency tab F, Board file #1).

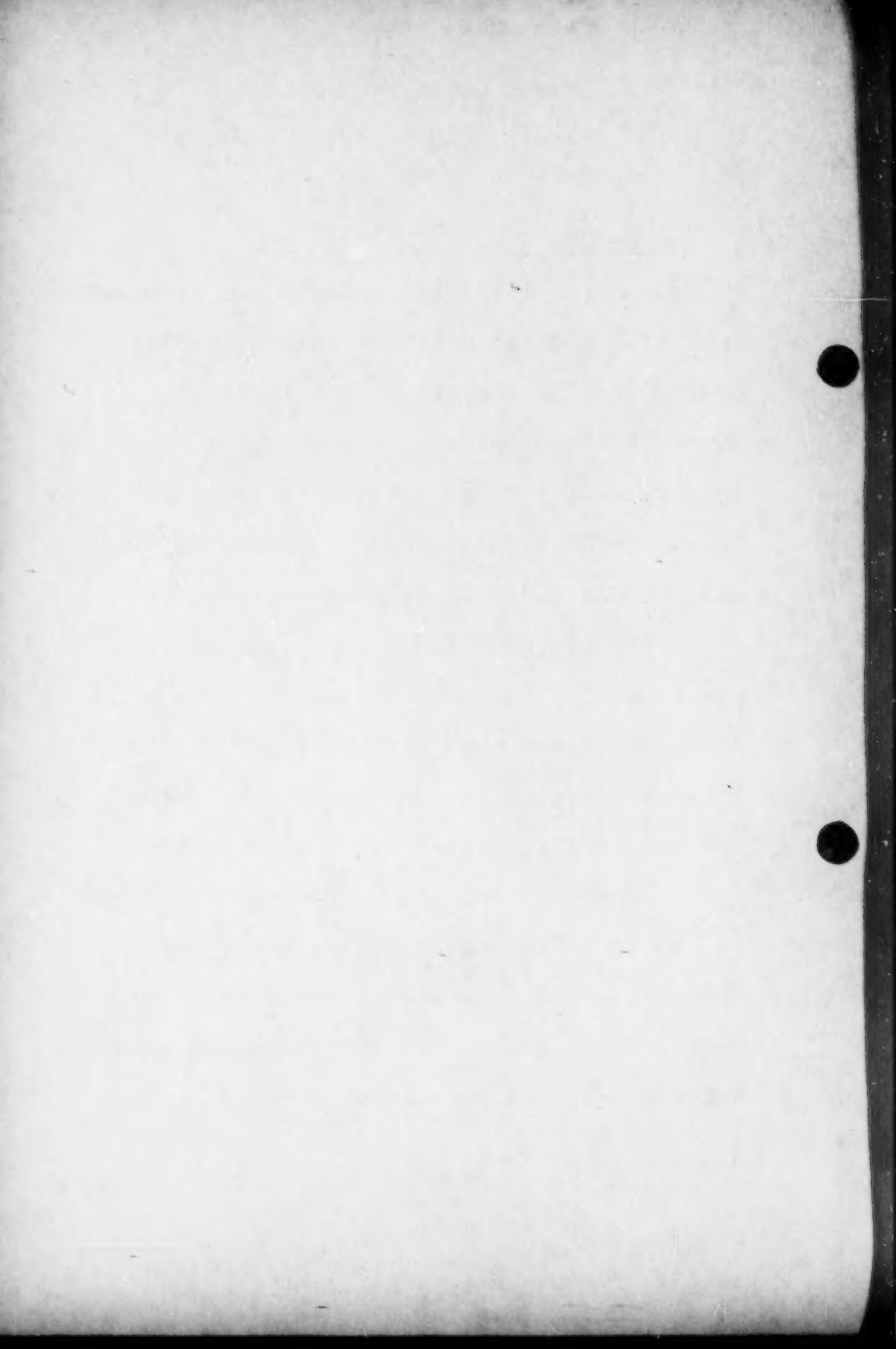
Even if Roy and Council had "tasked" appellant with doing Craig's application, there is no evidence or allegation suggesting that they authorized him or expected him to use agency time or equipment for the project. While appellant maintained this expectation was implicit in the time frame for submission of the application -- there was no other way he could have completed it on time --



I find his claim untenable. If the appellant actually thought this was contemplated, he had an obligation to obtain clarification before using government time and resources for a personal matter.

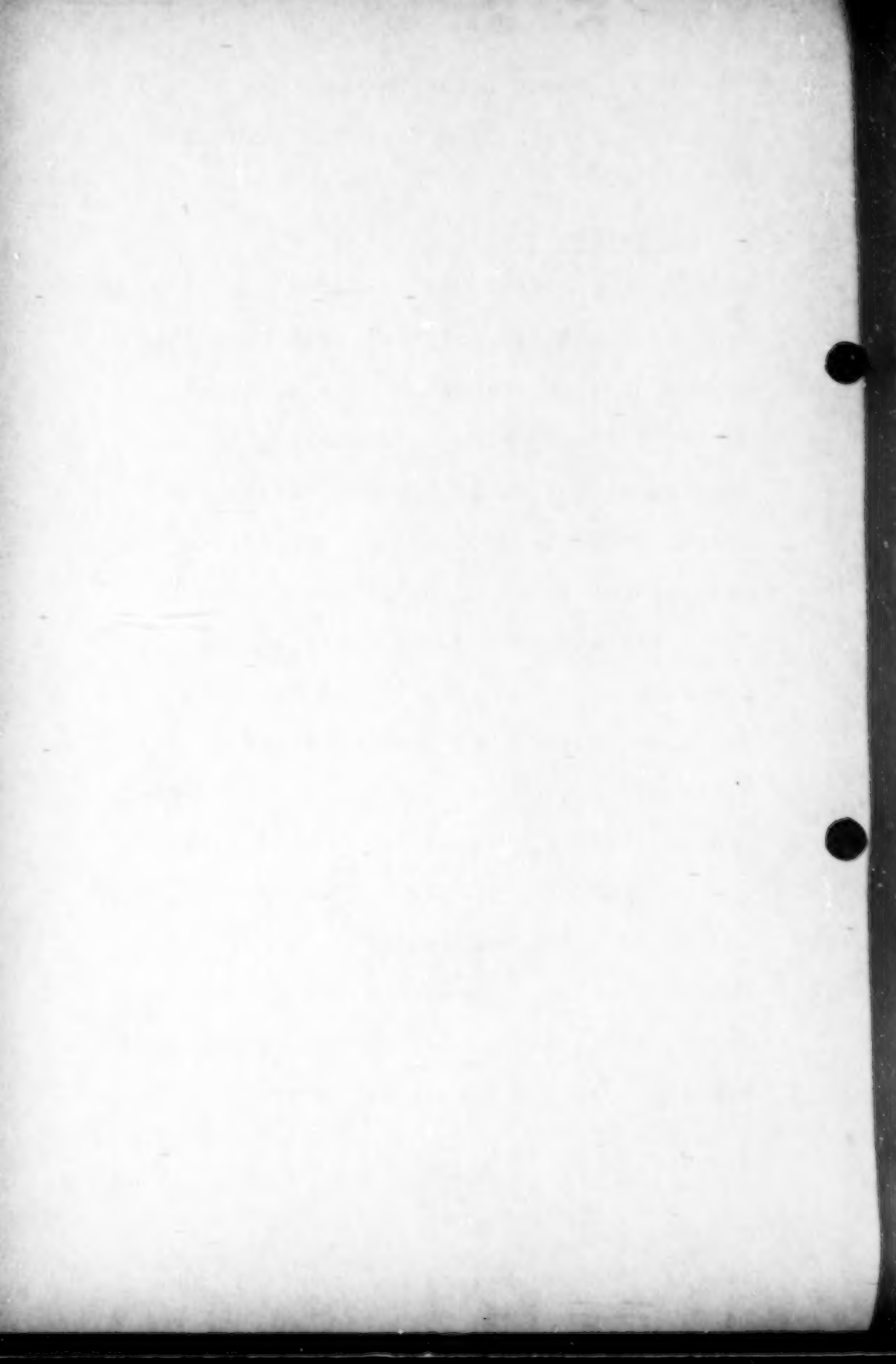
Appellant also argued, at one point, that he did the application because Craig directed him to and he was physically afraid of Craig. There is no evidence to support this assertion. In reality, it appears that, although his relationship with Craig later deteriorated and appellant attempted to shift all blame for any wrongdoing to Craig, at the time the application was done, appellant was one of Craig's main supporters, if not the primary one.

Finally, appellant argued that there was no offense because there was no showing



that his actions resulted in monetary loss to the government. This claim has no validity. As was pointed out in the decision letter, based merely on appellant's own admission that he spent 40-50 hours on the application and, given his rate of pay at the time (\$38,727 per year), the government paid appellant somewhere between \$750.00 to \$900.00 for his work on a personal project. And this does not include the fact that the computer could not be used for official purposes during this time, nor any costs associated with the use of the computer. Cf. Lemmon v. Department of Agriculture, 23 M.S.P.R. 506 (1984) (while no direct cost to the government from off-duty use of computer, such use may increase need for servicing, reduce storage capacity, and lead other employees to engage in misuse).

I find that preparation of a job



application does constitute personal business. I further find that, on the facts of this case, appellant's preparation of Craig's application using the Center's computer on paid time constituted misuse of government time and property. Charge #3 is SUSTAINED.

Charge #4

False and Malicious Statements

The agency's fourth charge is that, in a letter dated June 3, 1987, to the Commander, United States Army, Japan, Lieutenant General Charles W. Dyke, appellant made false and malicious statements against various government officials with the intent or effect of harming their reputation, authority, or official standing. More specifically, the agency charged that appellant stated that a Deputy Community Commander was reputed to have an enlisted man's wife as a lover,

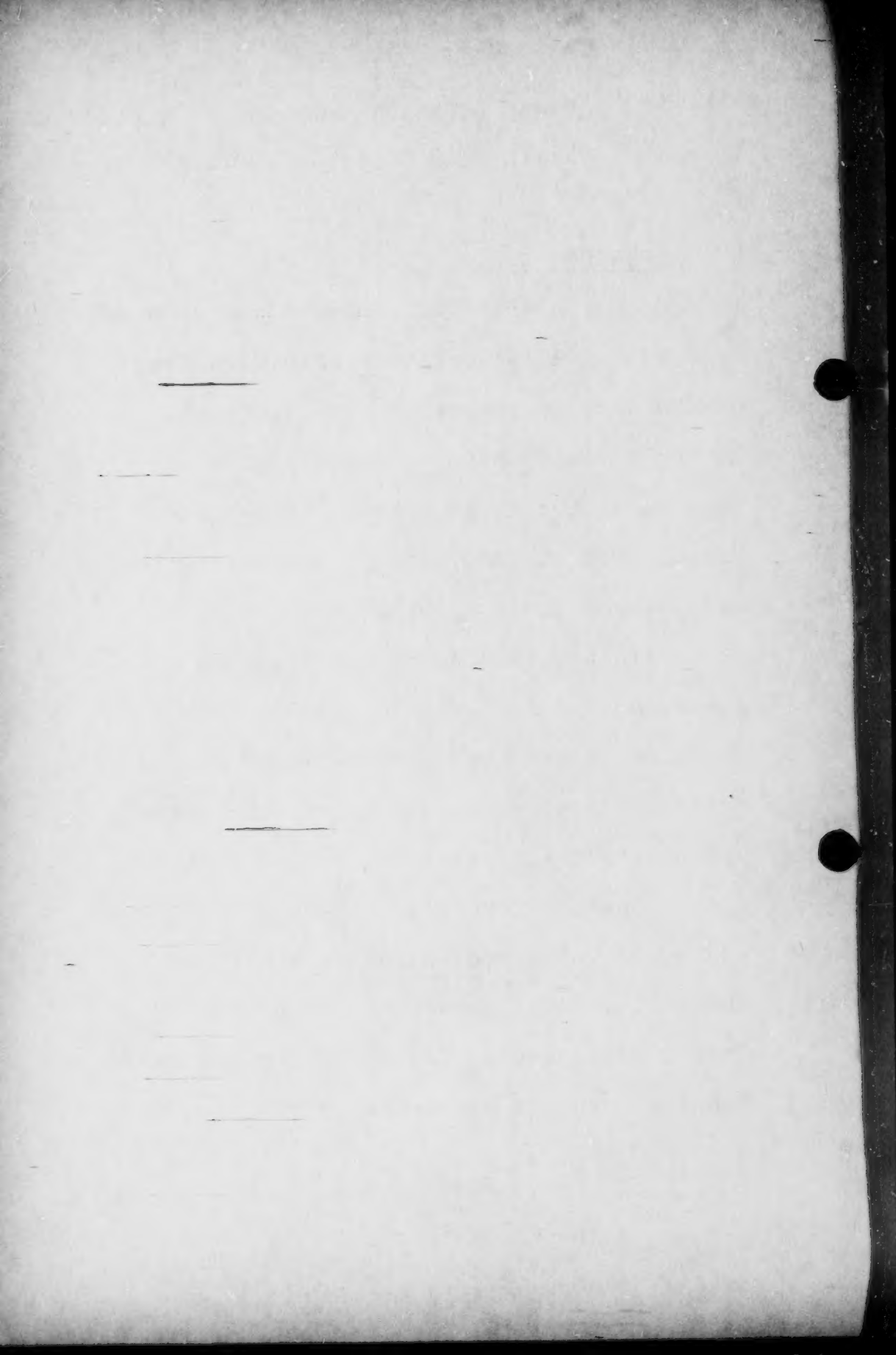
that this same Deputy Community Commander and various officials of the Civilian Personnel Office were improperly motivated to ensure the nonselection of MAJ Craig for the civilian position at the ATC, that a senior staff officer deliberately lied and thereby undermined the authority of Commander Dyke in regard to a Ph.D. program, and that a former Deputy Community Commander encouraged appellant to give preferential treatment to an educational institution by whom he was employed. See letter, tab XXX, Board file #2.

That letter (plus some follow-up correspondence) prompted two AR 15-6 Board of Officers Investigation hearings, one on June 16-17, 1987, with Colonel George R. Hegstrom as the Investigating Officer (agency tab BBB, Board file #4) and one on December 7-8, 1987, with Colonel Thomas J.

Kiernan as the Investigating Officer
(agency tab AAA, Board file #5).

Appellant was present and was represented at these investigative proceedings. He had a right to request the presence of witnesses. Witnesses did testify and they were subject to cross-examination. A transcript was kept of their testimony. These transcripts are part of the official record of this case at the location indicated above.

The conclusions of COL Hegstrom were that there was either "no evidence" or "absolutely no evidence" to support any of appellant's allegations. (Tab BBB, 25th page down). The conclusions of COL Kiernan were, inter alia, that 1) by the spring of 1987, appellant disagreed with what he perceived to be the "micromanagement" of the ATC by military

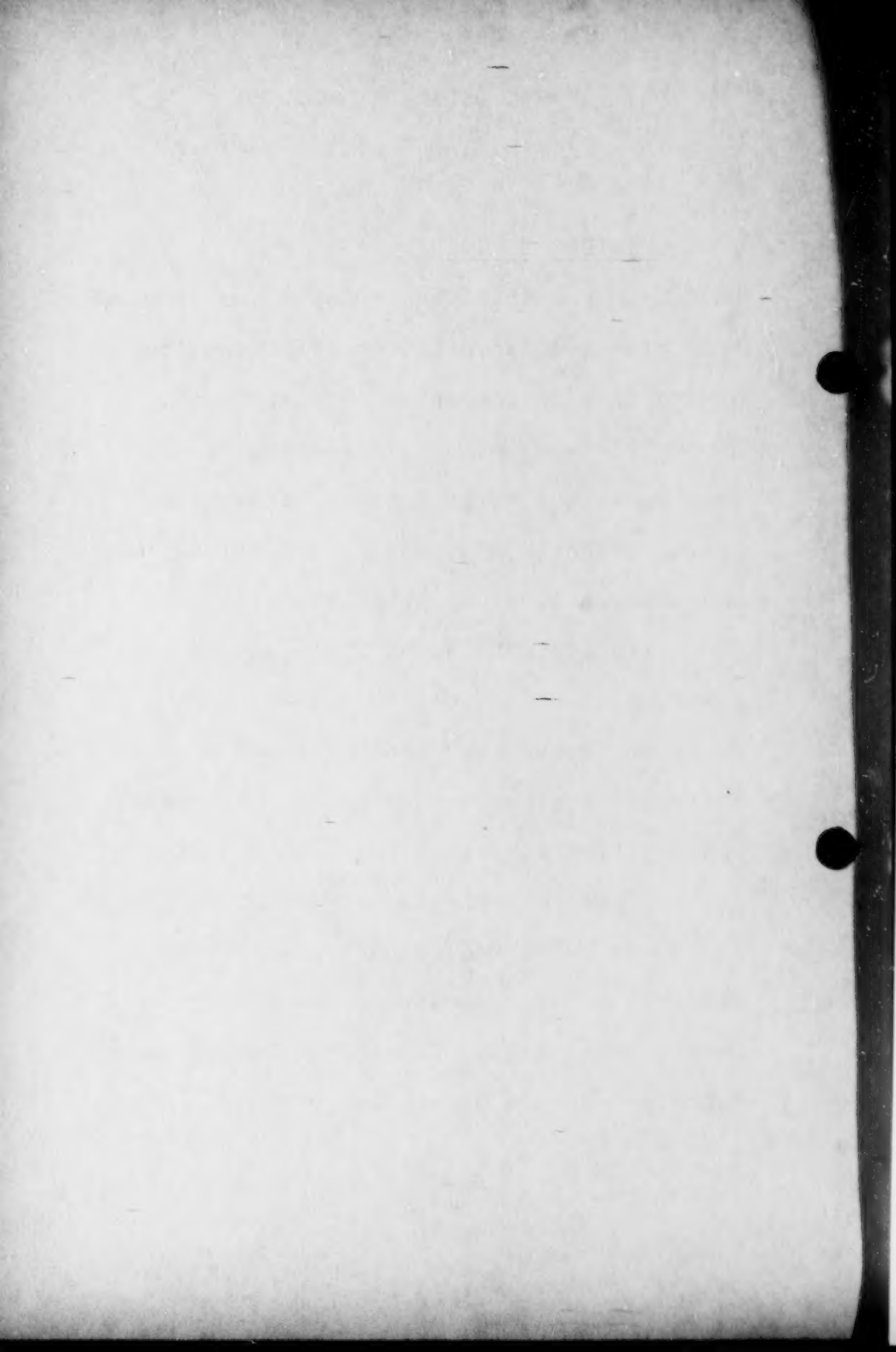


officials, 2) that his disagreements involved personal perceptions, not violations of law or fraud, waste, and abuse, 3) that as a result of his disagreement, appellant deliberately began a pattern of letter writing to the superiors of those with whom he disagreed, 4) that these letters contained malicious and unfounded statements intended to influence higher authority to take action in accordance with his personal view, 5) that this course of conduct damaged the reputation and standing of those with whom appellant disagreed and adversely effected the working efficiency of the ATC, and 6) appellant's intention was to win his personal battle for control with the command, not protect the public interest in matters of public concern. (Agency tab AAA, 4th and 5th pages down).

I have read the transcripts of these

proceedings and examined the documents entered during the course of them, and I agree completely with the findings of the Investigating Officers. In his appeal to the Board, appellant did not argue or submit evidence to demonstrate that his allegations were well founded. He did, however, advance several theories in his defense on this charge.

First, appellant claimed that because COL Kiernan recommended a reprimand, the inclusion of this charge in the instant adverse action constituted double jeopardy. His claim is not well taken. First, COL Kiernan's recommendation was explicitly "noted and not-approved or disapproved at this time." (Tab AAA, 6th page down). Thus, no action was actually effected. In addition, a reprimand is not either an "adverse action," see 5 U.S.C. 7512, nor a criminal charge, so neither the

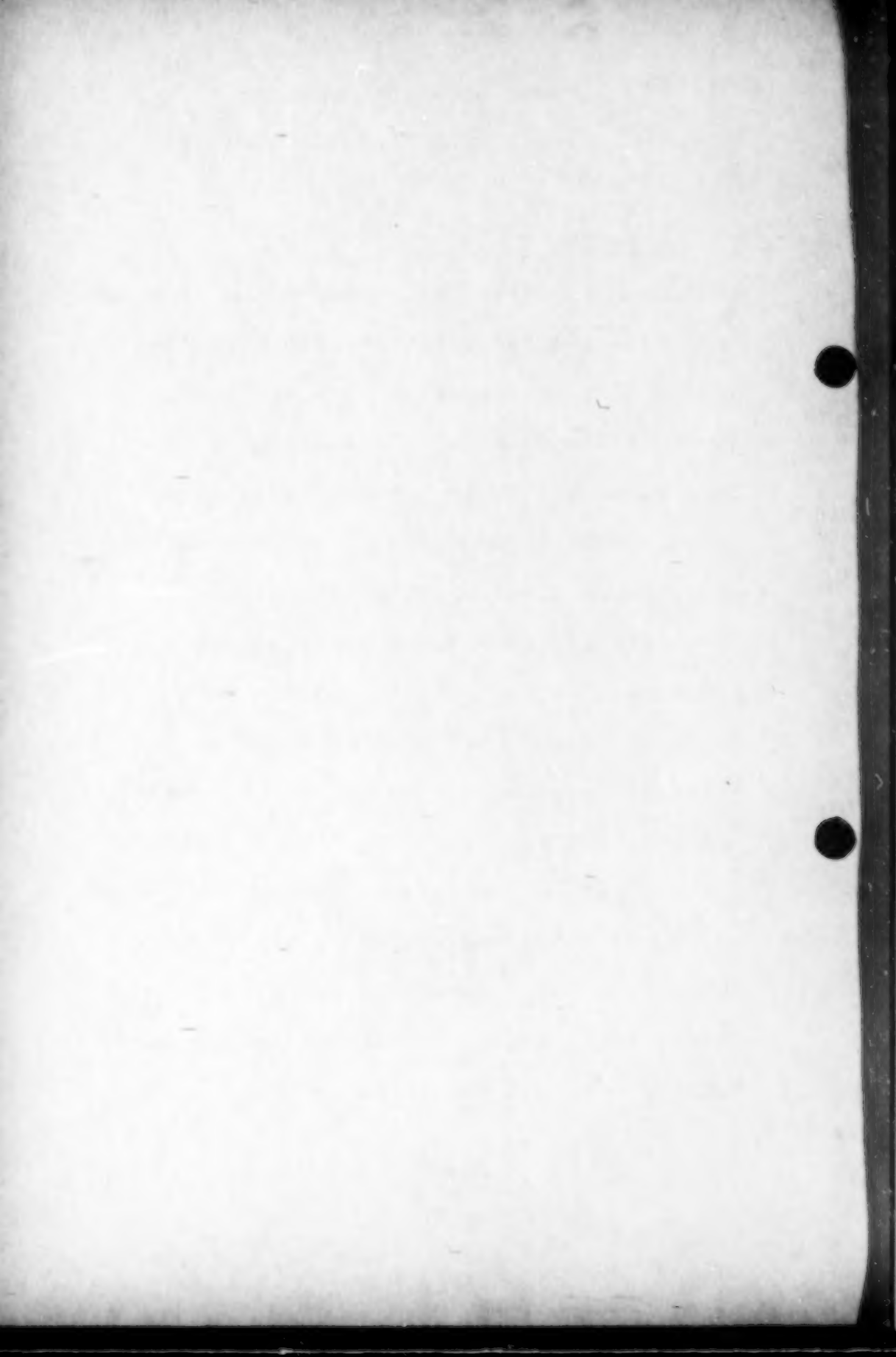


prohibition against double jeopardy nor the prohibition against subsequent administrative punishment for the same action applies. See *Cabral v. Department of Health and Human Services*, 7 M.S.P.R. 372, 373-4 (1981).

Second, appellant argued that the agency is barred by the doctrine of laches from bringing this charge since it was aware of the basis for it more than one-half year before this adverse action was undertaken. This claim is not well taken either. The delay in this case was not unusually long, there is no evidence appellant was prejudiced thereby and, by the time COL Kiernan rendered his decision, agency officials were well aware that the pending CID investigation could result in additional charges which would logically be brought as a unitary action. See, e.g., *Special Counsel v. West*, 18 M.S.P.R. 519,

522-3 (1984) (no laches bar since 18 months delay not inherently unreasonable and no prejudice shown), and *Krauthamer v. Department of Agriculture*, 4 M.S.P.R. 555 (1981) (laches not applied to a delay of nine months where no prejudice shown).

Finally, appellant claims that his June 3, 1987, letter is protected by the First Amendment. I cannot agree. First, as is discussed above, appellant's letter did not address matters of public concern. It was essentially a personal diatribe. Second, even if his letter did contain some information of tangential public concern, that content was far outweighed by the agency's interest in promoting the efficiency of the public service it performed. See, e.g., *Sigman v. Department of the Air Force*, MSPB No. AT07528710606, slip op. (July 8, 1988), and *Mings v. Department of Justice*, 812 F.2d 384,



D. Nexus

There is no issue as to nexus in this case. All four of the sustained charges are job-related and had a direct effect on either appellant's ability to perform his job or the agency's ability to accomplish its mission.

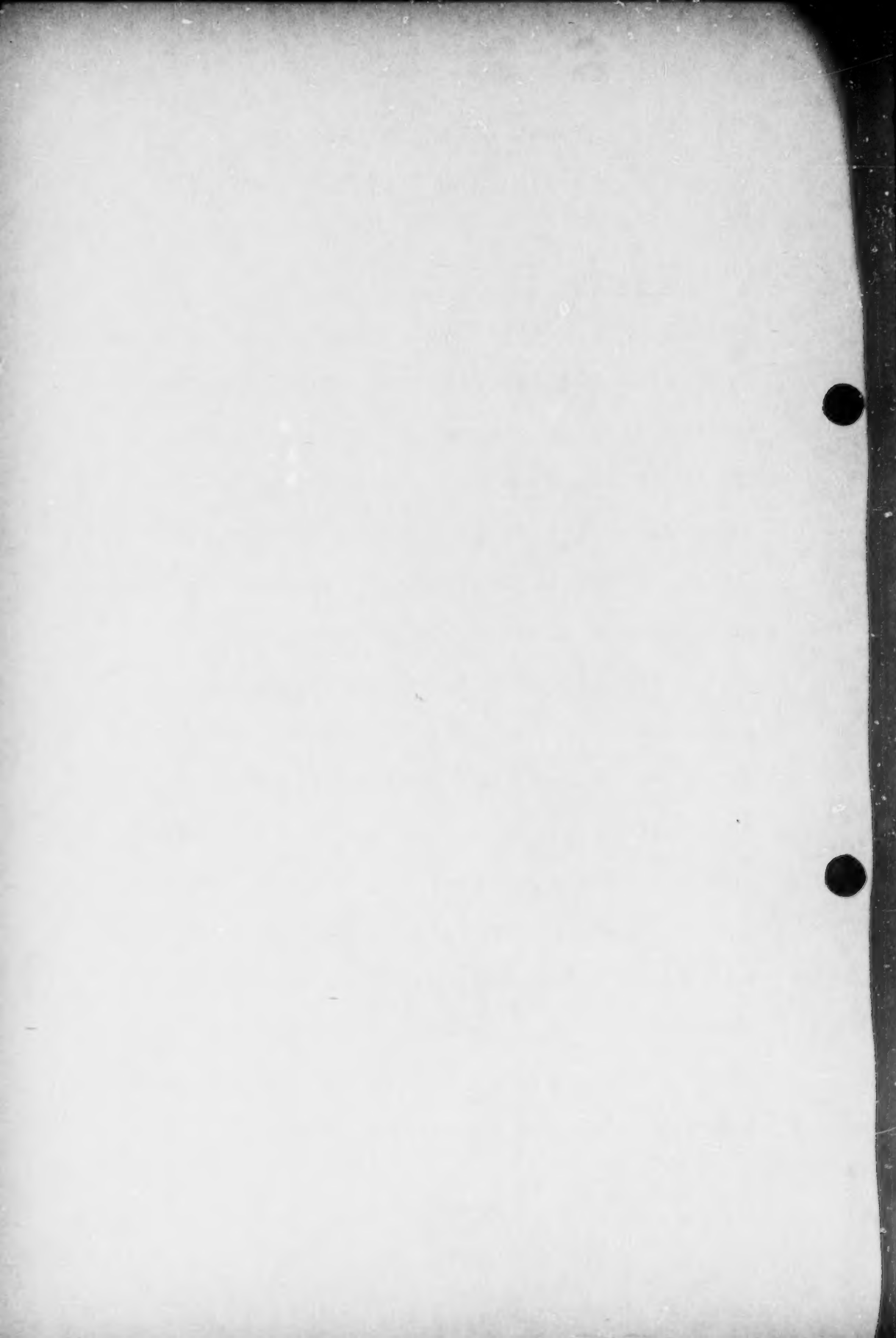
E. Affirmative Defenses

Even though an agency carries its initial burden, its action cannot be sustained if the appellant demonstrates the action involved harmful procedural error or a prohibited personnel practice or otherwise not in accordance with the law. See 5 U.S.C. 7701(c) (2). See also 5 C.F.R. 1201.56(b) (1988). These are affirmative defenses for which appellant has the burden of proof by a preponderance of the evidence. 5 C.F.R.

1201.56(a) (2) (iii) (1988). Appellant alleged several affirmative defenses in this case.

Prohibited Personnel Practice

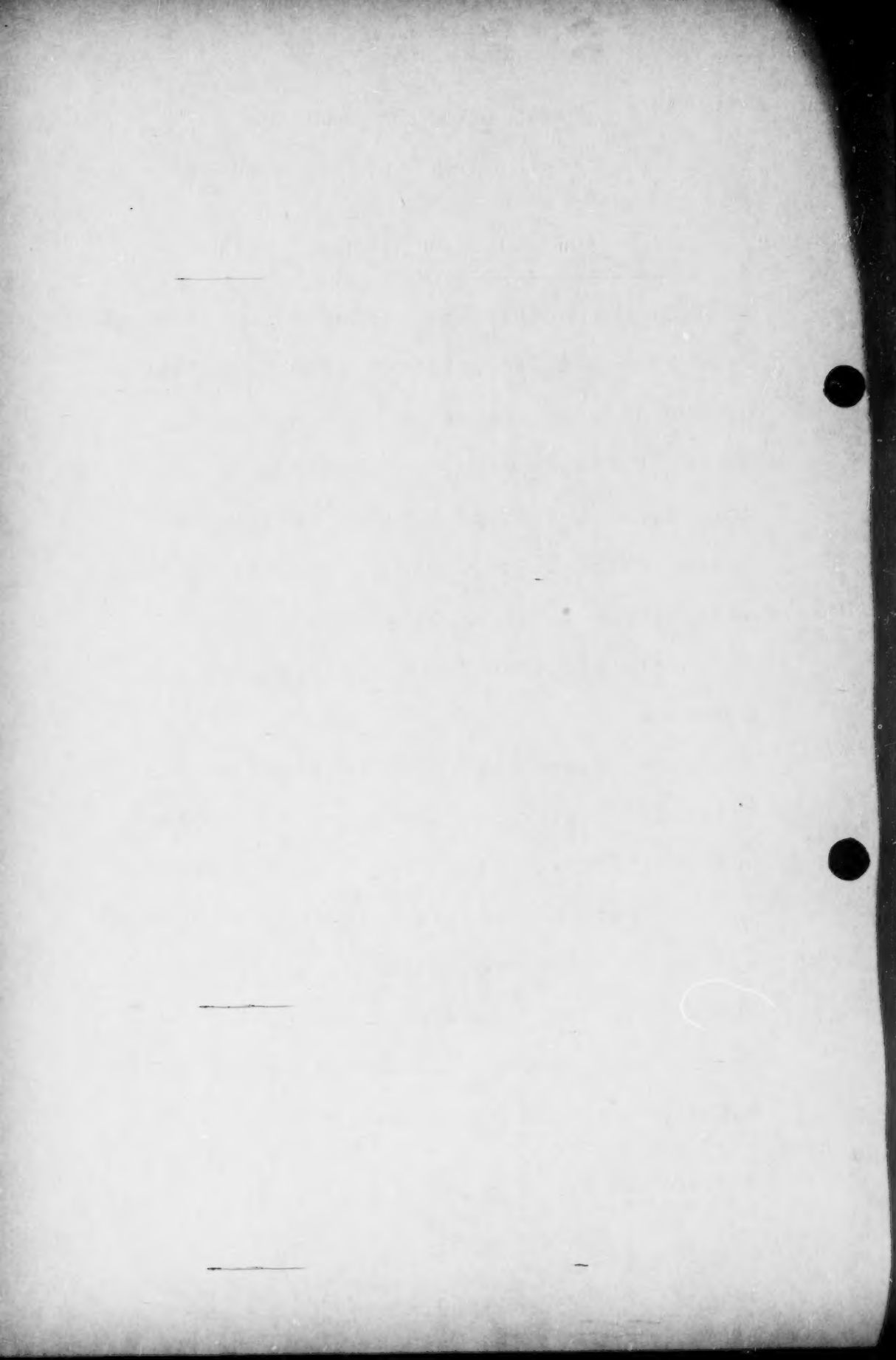
First, appellant claims that the agency's action was motivated by reprisal for his "whistle-blowing" activities. Such reprisal does constitute a prohibited personnel practice. See 5 U.S.C. 2302(b) (8). However, in order to establish a reprisal claim, appellant must show that (1) he engaged in a protected activity, (2) agency officials knew of the activity, (3) the adverse action under review could, under the circumstances, have been retaliation, and (4) after careful balancing of the intensity of the motive against the gravity of the misconduct, a nexus is established between the adverse action and the motive. See, e.g., *Stanek v. Department of Transportation*, 805 F.2d



1572, 1579-80 (Fed. Cir. 1986), and In Re Frazier, 1 M.S.P.R. 163, 193-94 (1979), aff'd, 672 F.2d 150 (D.C.Cir. 1982).

Appellant cannot establish a reprisal claim on the evidence in this record. First, as the discussion above indicates, it is extremely doubtful if he is a bona fide "whistle blower" because his activities related to personal complaints. Even if he were, I find no evidence of retaliatory intent on the part of agency officials nor any nexus between appellant's "protected activities" and the adverse action.

As was previously noted, appellant's "whistle-blowing" allegations were the subject of two careful investigative inquiries at the agency level and found to have no merit whatsoever. Conversely, the charges on which the adverse action was

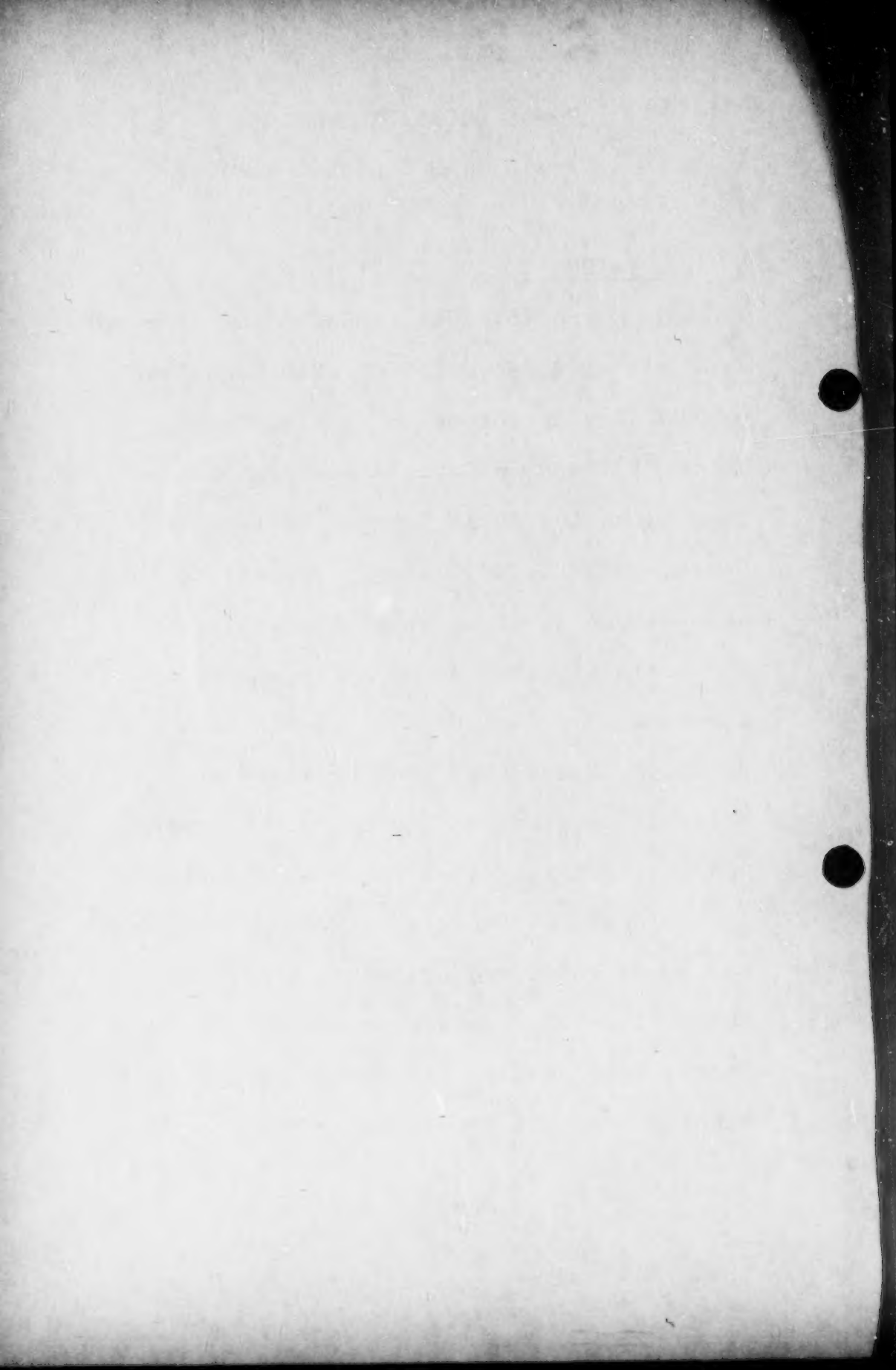


based have been found to have merit. Moreover, the charges are serious, especially charge #1. The proposing and deciding official, COL Roy C. Berry, was not the subject of any of appellant's disclosures. Moreover, all of COL Berry's actions of record -- including the notice of proposed action, the two transcripts of appellant's oral replies, and the decision letter -- indicate a careful, unbiased, full, and fair consideration of the charges and the evidence. In this regard, I note that COL Berry did not sustain one of the five original charges in the notice.

Thus, I conclude that appellant has not met his burden to establish that the action was motivated, in whole or in part, by reprisal.

Not In Accordance With Law

Appellant argued that the action was



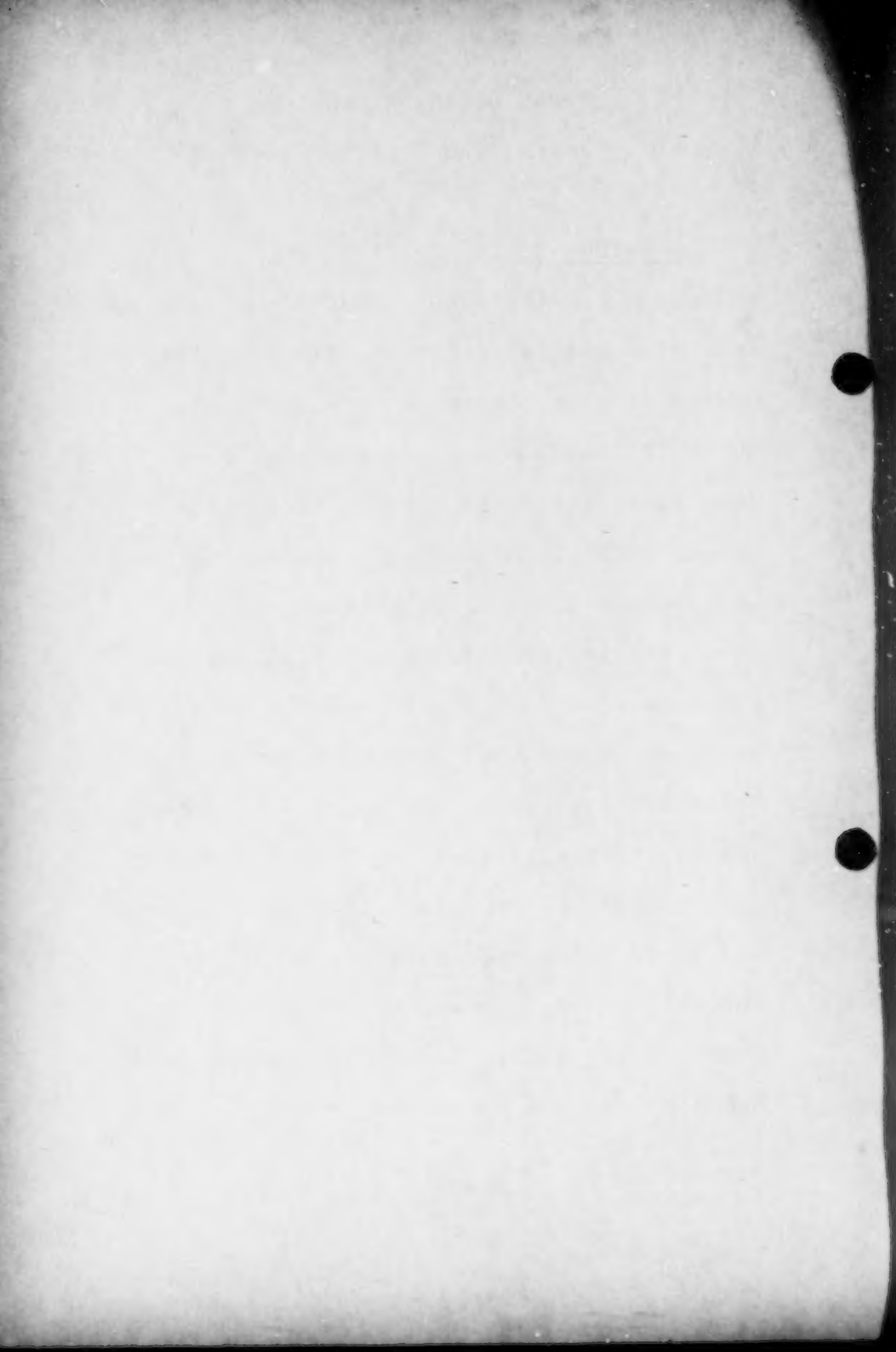
not in accordance with law because the Army failed to prepare performance standards by which his relationship with his military superiors and subordinates was clarified. Appellant maintained he had no standards since September 1986.

Although appellant never really particularized this argument, it is assumedly a variation of his claim that he was a helpless civilian caught between a law breaking subordinate (MAJ Craig) and military supervisors, to whom both he and Craig reported, who were giving Craig de facto directorship of the Center, or at least the military aspect of it. For many of the reasons already explained, I find his argument unavailing.

First, I doubt that the absence of performance standards could, as a general matter of law, ever render an adverse

action for misconduct invalid. This is especially true given the facts of this case. One does not need performance standards to know that such things as toleration of cheating, lying during an investigation, and misuse of government time and property are inappropriate.

Second, I give no credence to the idea that appellant failed to act on his knowledge of cheating due to a fear of, or uncertainty about, his place between MAJ Craig and higher-level military officials. He failed to act because Craig's misconduct inured to his own overall benefit. Third, appellant does not claim that he did not have performance standards from January 1985 to September 1986. And, finally, it appears he did have standards, and a position description, both dated September 1986 (tab KK) although there is evidence they were backdated. See February 19,



1988, oral reply transcript, pp. 2-4,
agency tab K, Board file #1.

Harmful Procedural Error

Appellant claimed that the agency committed harmful procedural error during the course of this action. Harmful error is defined, at 5 C.F.R. 1201.56(c) (3), as:

[e]rror by the agency in the application of its procedures which, in the absence or cure of the error, would have been likely to cause the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

See Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980) (mere theoretical possibility of prejudice insufficient to establish harmful procedural error).

First, appellant maintained that the agency's bringing of a charge in the notice of proposed action, i.e. "falsification in

entitlements (falsifying a leave form)", which was not sustained, constituted harmful procedural error. Appellant did not explain how this "error" harmed him and I can conceive of no possible way it could. To the contrary, there did appear to be a legitimate question around appellant's use of leave in the instance cited, and the agency's failure to sustain the charge for lack of preponderant evidence demonstrated, if anything, care in the taking of the adverse action.

Next, appellant maintained that the agency's failure to provide him a pretermination hearing, complete with the ability to confront his accusers, constituted harmful procedural error. The agency's failure to grant appellant a pretermination hearing was not an error. In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct.1633, 40 L.Ed.2d 15 (1974), the

Supreme Court held there was no constitutional right to such a hearing. No statute or Board regulation provides for one. And, in the absence of an agency regulation requiring one, it is not error to provide one. Cf. *Mercer v. Department of Health and Human Services*, 772 F.2d 856 (Fed. Cir. 1985) (error for agency to deny employee predecision hearing mandated by agency regulation where employee showed prejudice as a result).

In this case, appellant has not demonstrated that, even were a pretermination hearing provided, the outcome would have been different. I note that appellant requested a hearing before the Board, then withdrew it and requested a decision on the record. See tab 13, Board file #6.

Next, appellant argued that the

agency erred because CID did not provide either COL Berry or him with all the attachments to its investigation reports. The evidence ultimately established that none of these attachments were particularly relevant, however, and not at all exculpatory. And, appellant was finally provided with them for inclusion in the record of this appeal. See tab 18, Board file #6. Thus, I find no error in this regard.

Finally, appellant argued that COL Berry was biased and predisposed to remove him. This claim was primarily a bare allegation by appellant. There was precious little specification to it and even less evidence to support it.

Appellant first suggested that Berry was biased and predisposed because he refused to accept COL Kiernan's

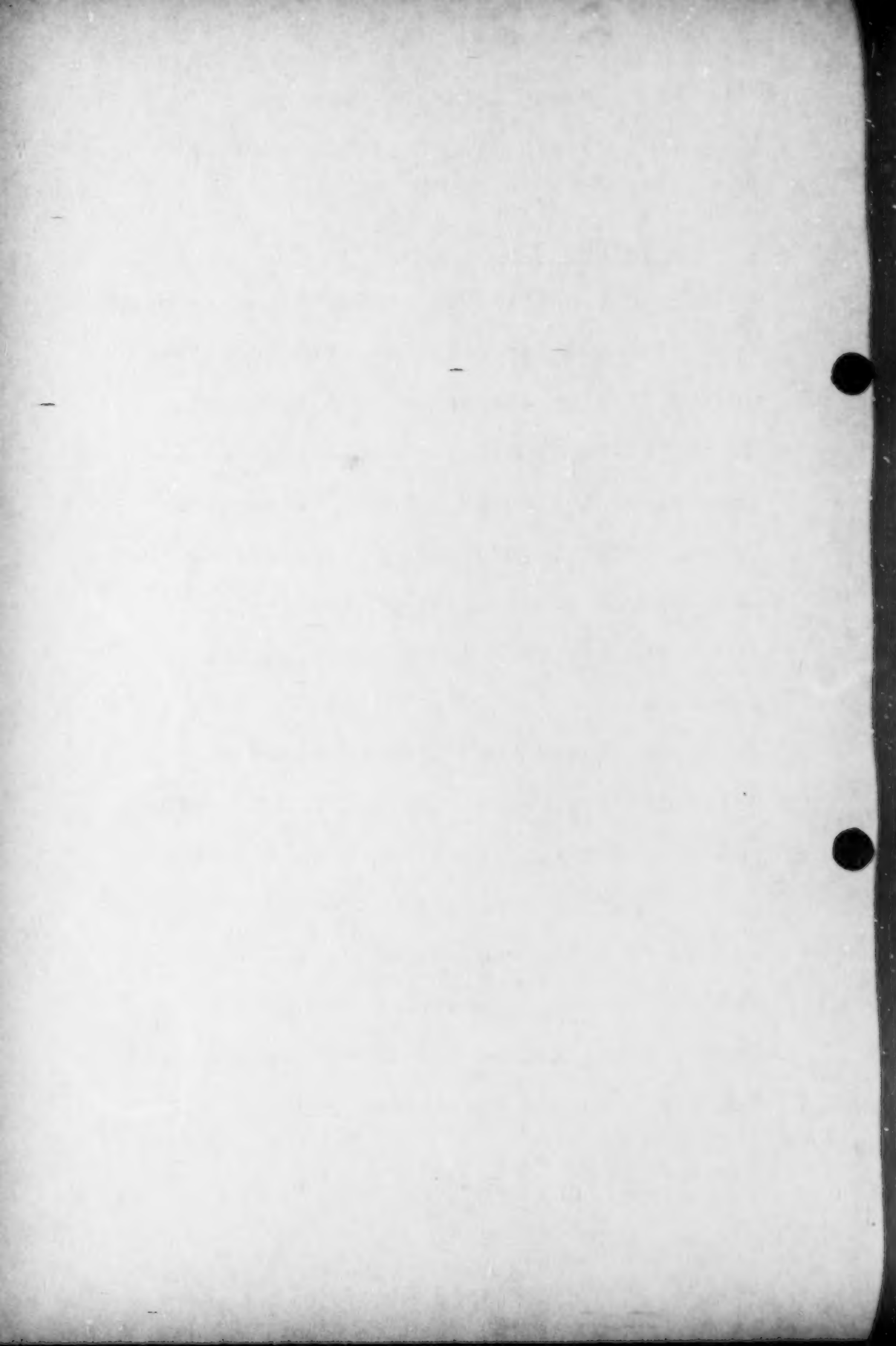
recommendation for a reprimand on the charge of false and malicious statements. As has been previously noted, that recommendation was superceded by the revelation of other, more serious charges resulting in the instant action of which the false and malicious statements charge was only a part. COL Berry's failure to treat it as a separate incident and impose a reprimand is no indication of bias or predisposition.

Second, appellant complained that, on February 9, 1988, COL Berry approached James Kardeke while he was lunching at the Camp Community Club and advised him to the effect that appellant was attacking his credibility, that perhaps appellant was not as good a friend as Kardeke may have thought, and that Kardeke could not "remain in the middle any longer," he had to choose sides. It is not clear from the record to

what this conversation precisely referred. However, I do not find that it rises to the level of harmful procedural error.

While certainly not the preferred procedure, there is no constitutional, statutory, or regulatory prohibition against ex parte communications between a deciding official and witnesses. See, e.g., *Brewer v. American Battle Monuments Commission*, 779 F.2d 663, 665 (Fed. Cir. 1985), and *Appling v. Social Security Administration*, 30 M.S.P.R. 375, 381, (1986). And, both Kardeke (tab L) and Berry (tab D-3) made MFR's of the incident and Berry readily acknowledged it to appellant during the February 19, 1988, oral reply. (Agency tab M, p. 4).

There is no evidence that Kardeke was upset or intimidated by the incident. It occurred at approximately the time that

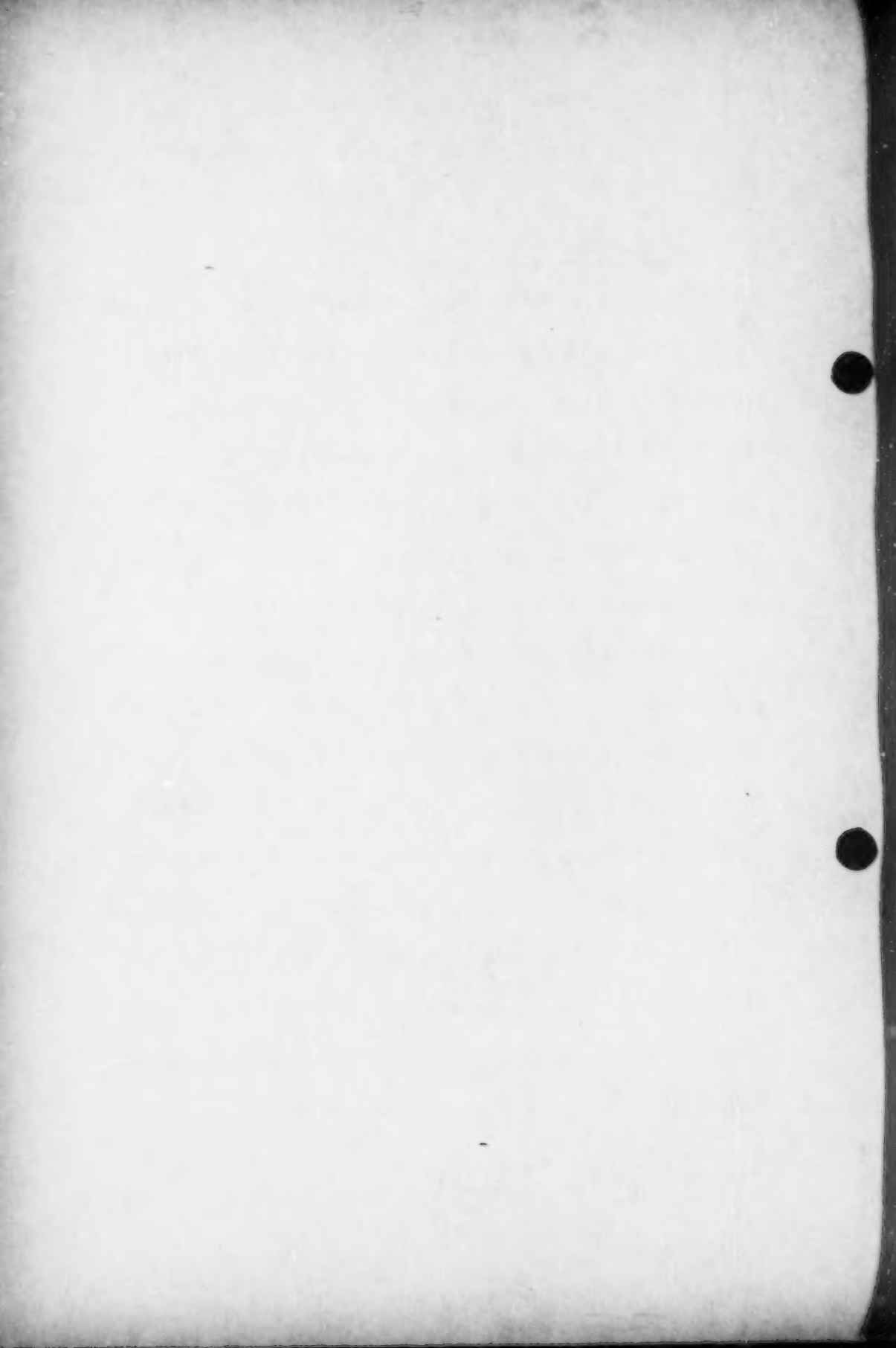


the CID was concluding its investigation and long after Kardeke had made his sworn statements for the record. Based on this, I conclude that Berry's remarks most probably referred to appellant's ongoing crusade against the military command in his waning days of employment at Camp Zama and had nothing to do with the charges in this case.

I find no basis for appellant's claims of harmful procedural error, either individually or in their cumulative effect.

F. Reasonableness Of The Penalty

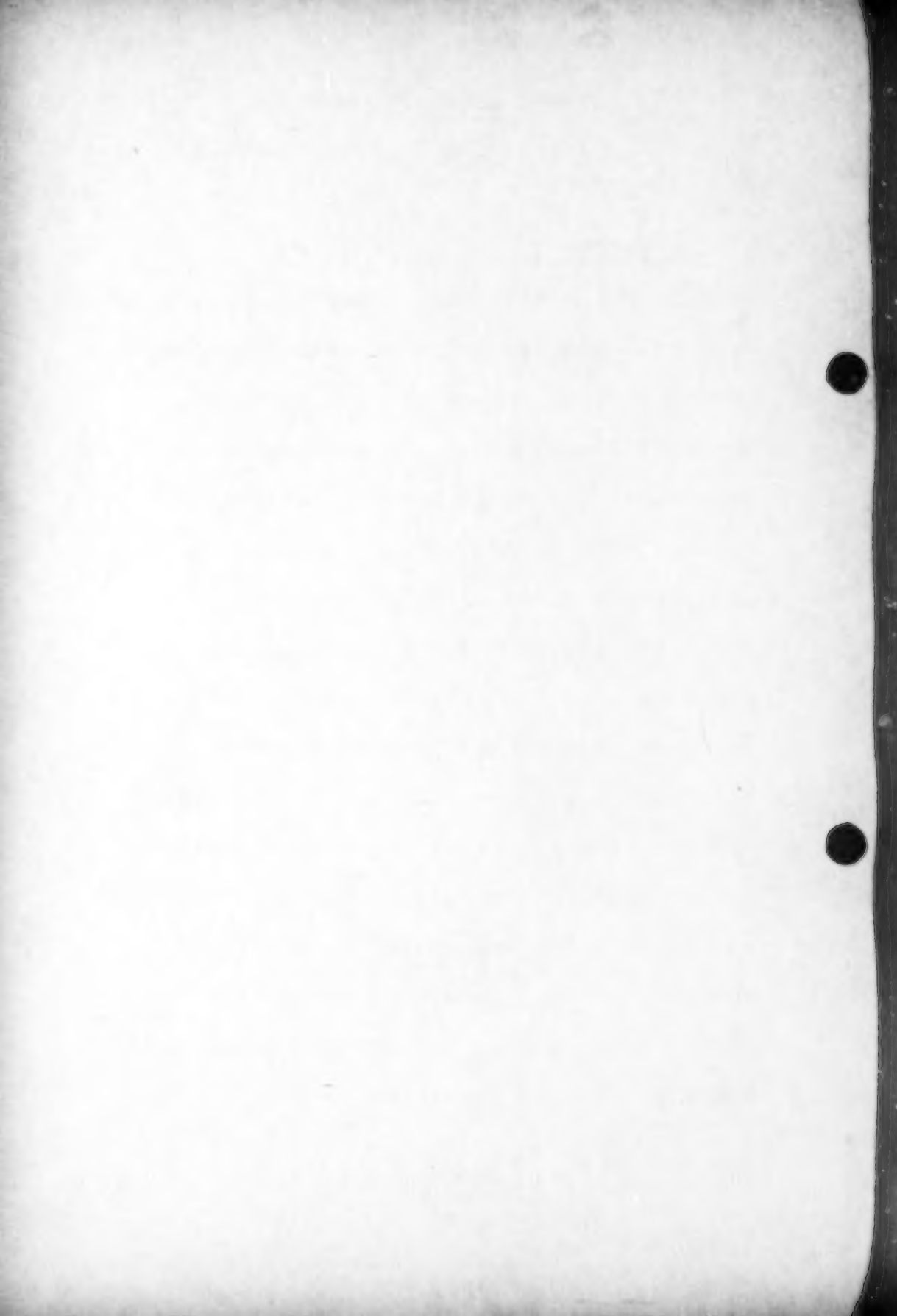
In Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-6 (1981), the Board held that its role was not to insist on a specific, appropriate penalty but, rather, to assure that the agency conscientiously considered all relevant factors and selected a penalty which was within the



tolerable limits of reasonableness. To assist in this review, the Board provided a number of non-exclusive factors which would normally be pertinent.

It appears, from the "Notice of Decision" (tab D) that COL Berry considered all the relevant factors. I cannot say that his selection of removal was beyond the tolerable limits of reasonableness.

First, I find, as did COL Berry, that the charges are serious. The failure to report or otherwise act on clear, continuing evidence of test fraud in an activity under his overall supervision was gross misconduct and, by itself, likely constituted grounds for removal. The next two charges -- false statement and misuse of time and property -- while more isolated and minor in their factual content, cast



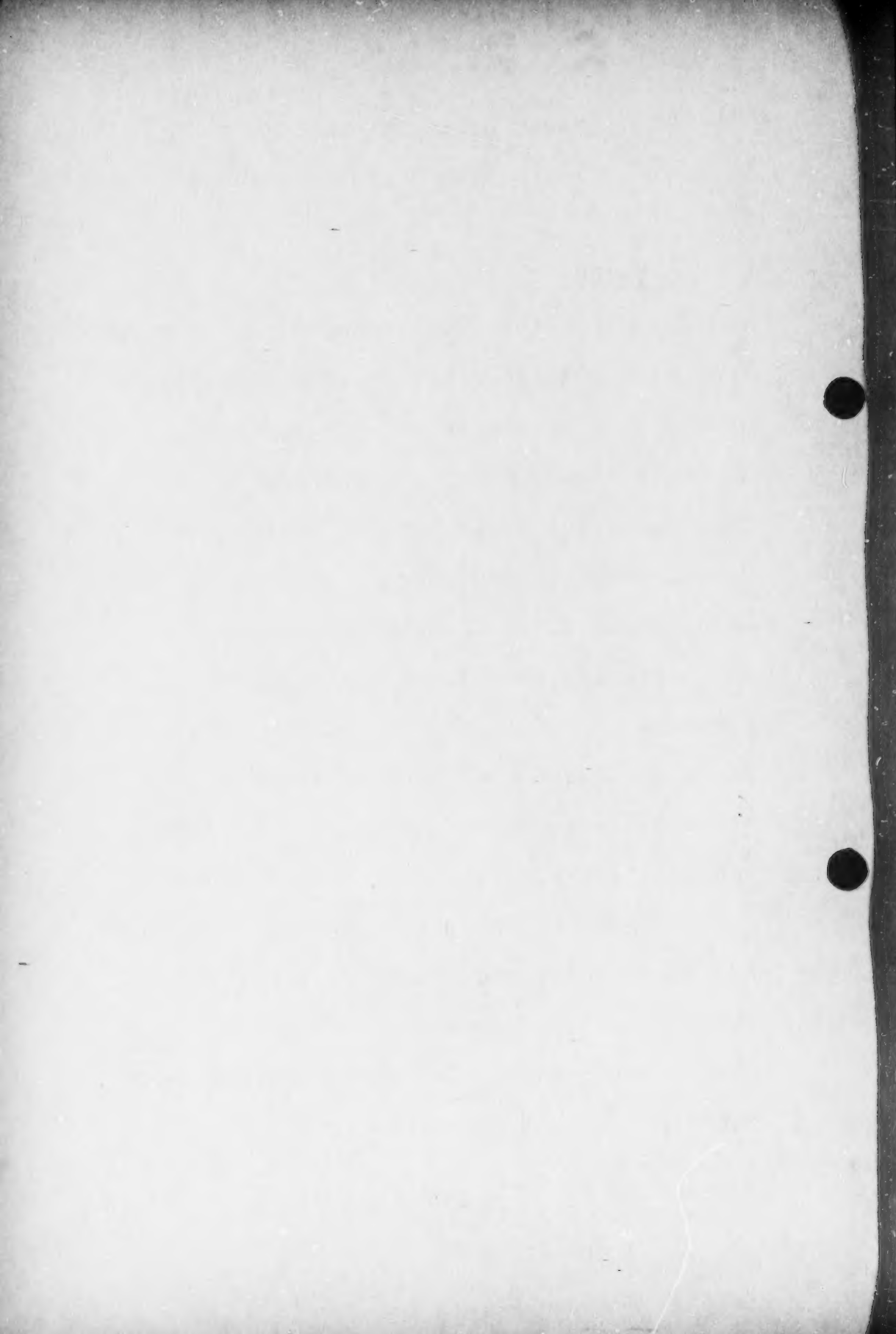
further doubt on appellant's integrity and his judgment. The last charge, false and malicious statements, raised additional questions about his judgment and common sense. It also strongly suggested that appellant was not a good candidate for rehabilitation and would not function well in a lower-graded position if he were merely demoted.

As noted by COL Berry, the agency's Table of Penalties provides a recommended range of reprimand to removal for a first offense on each of the latter three charges. (Agency-tab YY, Board file #2). The table does not specifically address the first charge, but both Department of the Army policy statements and regulations emphasize the need to prevent fraud by strong disciplinary measures and recommend removal for any fraudulent misconduct in the absence of strong mitigating

circumstances. See id.

Appellant maintains that he was subjected to disparate treatment based on his allegation that no one but him was punished. Even assuming the truth of his claim, it provides no basis for mitigation. First, as Director of the ATC, appellant was in a unique position; as a supervisor, a higher standard of conduct was required of him. See *Miller v. Department of the Navy*, 11 M.S.P.R. 518, 521 (1982).

There is no evidence that MAJ Craig, perhaps next in line in terms of responsibility and culpability, was punished. However, he was a military member, not a civilian employee like appellant. The evidence shows that he was scheduled to retire on October 1, 1987. (Agency tab CC, exhibit 26 attached to Interim CID Report, Board file #2). The



Interim CID Report, issued December 1, 1987, (tab CC) shows Craig's address as Seattle, Washington, the location where, as the record indicates at various points, he had intended to retire. Thus, it appears he was no longer employed by the agency at the time adverse action was instituted and, assumedly, action against him as a retired military member would have presented practical difficulties which the agency did not choose to take on.

There is no evidence that Kardeke and Triem engaged in fraud and, unlike appellant, they brought evidence of fraud to their supervisor who was appellant. Townsend engaged in wrongdoing but he did so under pressure from MAJ Craig and under circumstances which reasonably led him to believe that his other supervisor, appellant, was not inclined to stop the

impropriety. Moreover, Townsend, unlike appellant, admitted his culpability.

Thus, I cannot say that COL Berry was unreasonable when he decided that all these considerations outweighed appellant's approximately fifteen years of prior discipline-free and competent Federal service. Removal was within the tolerable limits of reasonableness. Cf. *Mings v. Department of Justice*, 813 F.2d at 38809 (removal for critical letter to higher level supervisors, plus one other offense, despite eighteen years of excellent service); *Furlick v. Equal Employment Opportunity Commission*, 20 M.S.P.R. 71 (1984) (removal for misconduct affecting integrity of agency, misuse of telephone, and conducting personal business on agency time); *Boyd v. Department of Justice*, 14 M.S.P.R. at 431-2 (removal of FBI agent for unauthorized use of car, failure to

perform duties, and lack of candor during investigation); and Cohen v. Internal Revenue Service, 7 M.S.P.R. 57 (1981) (removal from position of trust for conducting personal business during duty hours not too harsh despite thirteen years of unblemished service).

III. DECISION

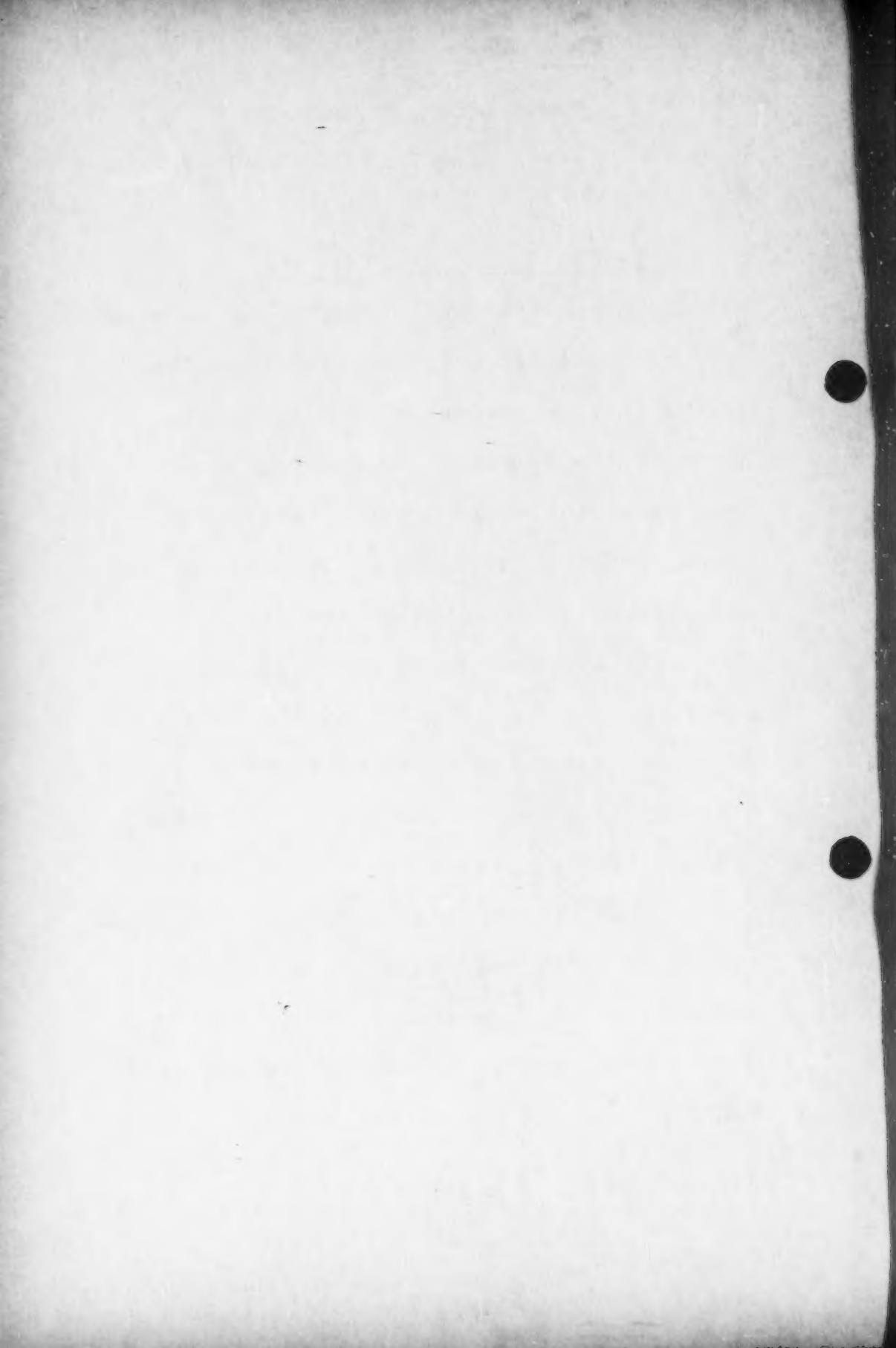
The agency's action is AFFIRMED.

FOR THE BOARD:

John W. Tapp
Administrative Judge

FOOTNOTES

- 1 A fifth charge contained in the "Notice of Proposed Action" -- falsification of a leave form -- was not sustained by the agency.
- 2 See appellant's August 14, 1987, sworn statement to Civilian Investigative Division (CID) Special Agent Warren Cox, agency tab NN, Board file tab #2.
- 3 Agency tab KK, Board file #2.
- 4 See also sworn statement of James Kardeke dated August 19, 1987, wherein Kardeke indicates that Triem related this incident to him on August 15, 1987, after Kardeke advised Triem that CID was investigating and had confiscated some test answer sheets. (Agency tab LL, Board file #2).
- 5 Appellant verified this incident, but from his own perspective, in his sworn statement dated August 14, 1987. (Tab NN).
- 6 See, e.g., Townsend's August 31, 1987, sworn statement. (Agency tab JJ, Board file #2).
- 7 See sworn statements of Kardeke dated August 3, 1987 (agency tab PP), August 19, 1987 (tab EE), all in Board file #2.
- 8 See Kardeke's August 3, 1987, sworn statement, at p. 2 (agency tab PP) and MFR (tab YY); Triem's sworn statements dated August 17, 1987 (tab MM) and August 21, 1987 (tab KK), and Townsend's September 24, 1987, sworn statement (tab II). Peterson's sworn statement, dated August 11, 1987 (tab OO), differs to some degree from the accounts of the other three, but is consistent as to the material facts.
- 9 See agency tabs NN (August 14, 1987), HH



(October 21, 1987), and FF (October 28, 1987), all in Board file #2.

- 10 See "Memorandum" dated January 29, 1988 (agency tab T); transcript of oral reply on February 8, 1988 (tab Q); memorandums dated February 9 (tab P) and February 10 (tab O); and transcript of oral reply on February 19, 1988 (tab M).
- 11 Appellant's son apparently sustained a brain injury in a mid-December 1986 automobile accident in the State of Massachusetts and was hospitalized for an extended period of time.